

87-2045

No. ____

Supreme Court, U.S.
FILED

JUN 12 1988

JOSEPH F. SPANIOLO, JR.
CLERK

In The
Supreme Court of the United States

October Term, 1987

PAUL L. DOUGLAS,

vs.

Appellant,

STATE OF NEBRASKA, EX. REL.
NEBRASKA STATE BAR ASSOCIATION,

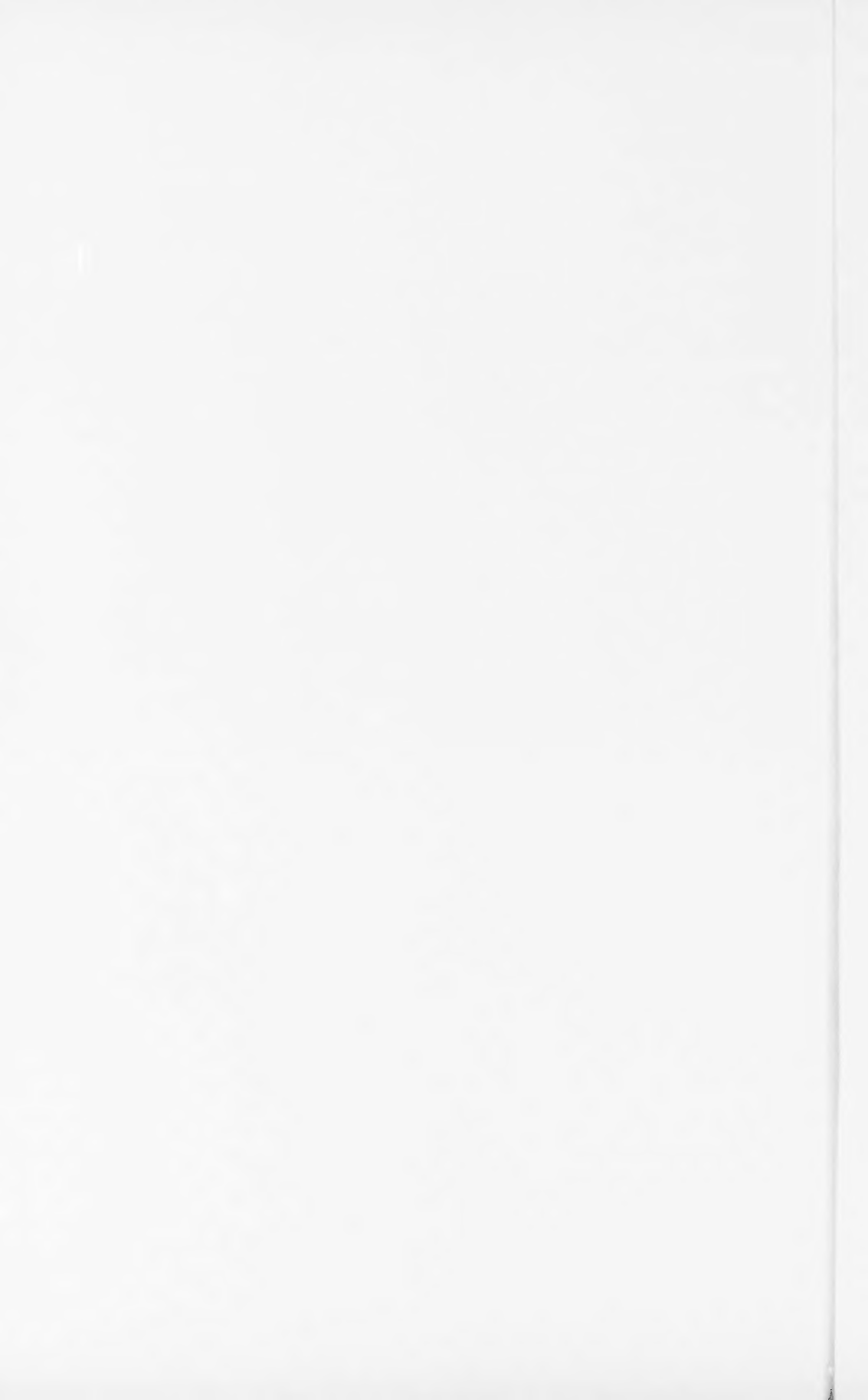
Appellee.

ON APPEAL FROM THE
SUPREME COURT OF NEBRASKA

JURISDICTIONAL STATEMENT

WILLIAM E. MORROW, JR.
ERICKSON & SEDERSTROM, P.C.
One Merrill Lynch Plaza
10330 Regency Parkway Drive
Omaha, NE 68114
(402) 390-7125
Counsel for Appellant

31972



QUESTION PRESENTED

Whether the procedures adopted by the Nebraska Supreme Court and as applied, ignored, or changed by that Court in the course of this case are violative of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States when the proceedings resulted in a judgment of suspension from the practice of law for a period of four years.

TABLE OF CONTENTS

| | Page |
|---|------|
| Question Presented | i |
| Table of Authorities | iii |
| Jurisdictional Statement..... | 1 |
| Opinion Below..... | 1 |
| Jurisdiction..... | 1 |
| Constitutional Provisions and Rules | 2 |
| How the Federal Question was Raised | 3 |
| Statement of the Case..... | 4 |
| Question is Substantial..... | 7 |

TABLE OF AUTHORITIES

Page

CASES

| | |
|---|----------|
| <i>Marshall v. Jerrico, Inc.</i> , 446 U.S. 238, 64 L.Ed. 2d 182, 100 S.Ct. 1610 (1980) | 8 |
| <i>In Re Murchison</i> , 349 U.S. 133, 99 L.Ed.2d 942, 75 S.Ct. 623 | 8, 9, 13 |
| <i>Schwase v. Board of Bar Examiners</i> , 353 U.S. 232 (1957) | 7 |
| <i>State v Barker</i> , 227 Neb. 842 (1988)..... | 13 |
| <i>State v. Douglas</i> , 217 Neb. 199, 394 N.W.2d 870 (1984)..... | 12 |
| <i>State of Nebraska, Ex. Rel., NSBA v. Douglas</i> , 227 Neb. 1, 416 N.W.2d 515 (1987) | 1 |
| <i>Wellner v. Committee on Character and Fitness</i> , 373 U.S. 96 (1963)..... | 7 |
| <i>Withrow v. Larkin</i> , 421, U.S. 35, 43 L.Ed. 2d 712, 95 S.Ct. 1456 (1975)..... | 8, 13 |

CONSTITUTION, STATUTES, AND RULES CITED

United States Constitution:

| | |
|----------------------------|---------|
| Fourteenth Amendment | 1, 2, 3 |
| 28 U.S.C. 1257(2) | 2 |

Disciplinary Rules:

| | |
|--------------|---|
| Rule 5 | 2 |
| Rule 6 | 2 |
| Rule 8 | 2 |
| Rule 9 | 2 |

TABLE OF AUTHORITIES—Continued

| | Page |
|---------------|------|
| Rule 10 | 2 |
| Rule 13 | 2 |
| Rule 14 | 2 |

JURISDICTIONAL STATEMENT

Paul L. Douglas, the appellant, appeals from the final judgment of the Supreme Court of Nebraska filed December 4, 1987 and modified by an order overruling the motion for rehearing and retaxing costs entered March 18, 1988 holding, by necessary implication that the Rules and their application in this case are not unconstitutional as operating to deny appellant of due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

OPINION BELOW

The opinion of the Supreme Court of Nebraska, which appears in the appendix p. l(a), *infra* is reported at 227 Neb. 1, 416 N.W.2d 515 (1987).

The Report of Referee, Thomas R. Burke, dated January 23, 1987 is not reported. It is reprinted in the appendix page 96a.

The report of the Disciplinary Review Board filed July 8, 1985 is not reported. It is reprinted in the appendix, page 209a.

JURISDICTION

The judgment of the Supreme Court of Nebraska suspending Appellant from the practice of law in Nebraska for a period of four years commencing December 20, 1984 was entered on December 4, 1987. A

motion for rehearing was entertained and denied on March 18, 1988.

A notice of appeal to this Court was timely filed in the Supreme Court of Nebraska on May 13, 1988.

This appeal is being docketed in this Court within ninety days from the ruling on the motion for rehearing below.

The jurisdiction of this Court is invoked under 28 U.S.C. 1257(2).

CONSTITUTIONAL PROVISIONS AND RULES

Fourteenth Amendment, United States Constitution:

Section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State where they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Disciplinary Rules, Nebraska Supreme Court:

Rules 5, 6, 8, 9, 10, 13, and 14 are reprinted in the appendix, page 266a.

HOW THE FEDERAL QUESTION WAS RAISED

The appellant first raised the claim in an additional answer filed October 20, 1986 that the rules of the Supreme Court of Nebraska are "unconstitutional and in violation of the Fourteenth Amendment of the Constitution of the United States" for the reason that "the Court is acting as accuser, prosecutor and judge, which constitutes a denial of due process of law." The issue was further pursued and argued in a post hearing brief filed with the referee after the hearing before him and prior to his report. The report of the referee recognized that the issue had been raised but elected to assume the validity of the rules and leave the question of their constitutionality to the Supreme Court. The issue was further raised and argued in appellant's brief filed with the Supreme Court of Nebraska when the appellee filed exceptions to the report of the referee. The Nebraska Supreme Court refused to recognize or discuss the question in its opinion and judgment dated December 4, 1987. That Court's failure to recognize or rule on the question was raised by appellant's motion for rehearing and was extensively argued in the brief in support of that motion. The Supreme Court of Nebraska overruled the motion for rehearing without opinion and thus, by necessary implication upheld its rules and the proceedings under them against the claim of unconstitutionality.

STATEMENT OF THE CASE

The appellant, Paul L. Douglas, was admitted to practice law in Nebraska in 1953. Virtually his entire career as a lawyer had been spent in public service, first as a deputy county attorney, then a county attorney and at the time of the events leading up to these proceedings, as Attorney General of the State of Nebraska.

In November, 1983, the largest industrial loan and investment company in Nebraska was declared insolvent by the Director of Banking. A prolonged, intensive media campaign of speculation, inference, and assumptions followed. In the course of that campaign, the fact that appellant had had business dealings with one of the principals of the failed institution and had loans with the failed institution at the time it was closed became known and was a subject of much publicity. Various investigations were conducted. Three of them, those by the Nebraska Legislature, a Lancaster County Grand Jury, and the Nebraska Bar Association, resulted in charges being filed against appellant. The appellant was found not guilty of charges of impeachment, the charges filed by the Grand Jury were dismissed, and the charges instituted by the Bar Association resulted in the matter now being appealed.

During an investigation by the Counsel for Discipline of the Nebraska Bar Association, a Judge of the Nebraska Supreme Court called Counsel for Discipline to his chambers. In a private meeting the Judge furnished Counsel for Discipline with copies of certain public records, reports filed by appellant with the

Nebraska Political Accountability and Disclosure Commission. Alleged deficiencies in those reports constituted the basis for all of the counts filed against respondent by the Disciplinary Review Board, and one of the five subdivisions of an additional formal charge filed out of time and without regard to the rules of the Court.

As a result of the investigation conducted by the Counsel for Discipline, a District Committee on Inquiry forwarded formal charges in six counts to the Disciplinary Review Board. That Board determined that one of those counts should not be filed, and accordingly deleted it.

Prior to the report of the Disciplinary Review Board being filed, Counsel for Discipline was advised by the State Advisory Committee that he should withdraw from the matter since his independence was in question. The Supreme Court, apparently in response to that opinion, amended its disciplinary rules to transfer authority over and responsibility for Counsel for Discipline from the State Bar Association to the Court.

After formal charges were filed, Counsel for Discipline filed a motion to reinstate the count dismissed by the Disciplinary Review Board and also filed four additional counts. Appellant filed a motion to disqualify Counsel for Discipline and to strike his filings. That motion specifically challenges the right, under the rules, of Counsel for Discipline to seek review of the action of the Disciplinary Review Board. The motion was summarily overruled, without opinion.

Following procedures established by the Disciplinary Rules, appellant tendered a conditional admission which would have disposed of the matter. Counsel for Discipline approved that conditional admission and agreed that the proposed sanction was appropriate. The Court, without opinion, rejected the conditional admission.

Shortly thereafter, the same judge who had furnished documents to Counsel for Discipline in the ex parte meeting in his chambers, contacted Thomas J. Walsh to determine whether or not he would accept appointment as "co-counsel for discipline" in this matter. The rules permit appointment of a member of the bar to prosecute formal charges. They do not provide for co-counsel and they require that the appointment be made shortly (within 10 days) after the formal charges are filed. This contact was also ex parte, and may, in fact, have even been without the knowledge of the Counsel for Discipline.

Shortly after that contact, the Court, on its own motion, appointed Mr. Walsh as co-counsel in this case. Mr. Walsh thereupon filed an additional formal charge. At or about the time such charge was filed, Mr. Walsh, in an ex parte meeting, furnished a copy of it to the same Judge of the Supreme Court of Nebraska. Appellant's objections to the irregularities in Mr. Walsh's appointment and to the belated filing of the additional charge were overruled without opinion by the Court.

A lengthy hearing was held before Thomas R. Burke as referee which produced a voluminous record and a report, reproduced at page 96a, in which the

referee concluded that none of the charges had been established and recommended that they be dismissed.

Counsel for Discipline and his co-counsel filed objections to the report of the referee and the matter was fully briefed and argued to the Court. The Court, upon its review de novo on the record made before the referee, in large part rejected the findings and recommendations of the referee and found appellant guilty of six of the eleven counts contained in the charge. Significantly, those six counts included five counts concerning which a judge of the Court had provided evidence to Counsel for Discipline and the other was a count which the Court permitted to be reinstated in violation of its own rules.

THE QUESTION IS SUBSTANTIAL

The question presented by this case is important. It involves a new aspect and extension of the situation which can result when investigative, prosecutorial and adjudicative functions are combined in one body or agency. Certain aspects of that question have been reviewed and ruled upon by this Court.

It is clear that a person cannot be excluded from the practice of law in a manner or for a reason that contravenes his rights under the United States Constitution. *Wellner v. Committee on Character and Fitness*, 373 U.S. 96 (1963), *Schwase v. Board of Bar Examiners*, 353 U.S. 252 (1957).

In Re Murchison, 349 U.S. 133, 99 L.Ed. 2d 942, 75 S.Ct. 623 (1955) held that due process considerations prevented a judge, who was acting as a one man grand jury, from citing individuals for contempt committed before him in that capacity, and prosecuting, presiding at, and adjudicating a subsequent proceeding in which a full evidentiary hearing was held based upon the contempt citation. The problems which seemed most to concern the Court were the grave dangers of prejudgment, the likelihood that the judge would base any decision in the matters upon his personal knowledge acquired during the grand jury proceedings, and the practical impossibility of examination and cross-examination of the judge as to such knowledge.

Other cases, which present a less complete picture of judicial involvement, and which arise primarily in an administrative setting, have recognized the practical requirements and needs of processing matters before administrative agencies. This case, although entirely a judicial proceeding, resembles and is perhaps more analogous to administrative cases. It is somewhat unique in that the first and only binding decision in it was made by the Supreme Court of Nebraska with no provision for further review or evaluation being provided.

In various cases, such as *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 64 L.Ed. 2d 182, 100 S.Ct. 1610 (1980) and *Withrow v. Larkin*, 421 U.S. 35, 43 L.Ed. 2d 712, 95 S.Ct. 1456 (1975) the Court has recognized that a procedural structure in which investigative, prosecutorial, and adjudicative functions are combined in one body or organization, the separation of those functions between

different groups or parts of that organization, the availability of subsequent impartial evaluation within the system and the availability of final review by an authority which is clearly impartial and unbiased may be sufficient to withstand a due process challenge.

In this case, however, the claim of appellant is that although a structure was provided which apparently could have preserved his rights to due process of law, the actions of the Supreme Court of Nebraska in large measure either neutralized or obviated all of such safeguards and as a result the matter reached a final determination which had been decided upon by at least a majority of the Court prior to the institution of the proceedings.

That is, the case is more closely related to the situation presented by *In Re Murchison* than to the situations in which such safeguards existed and were presumptively applied.

The Rules of the Nebraska Supreme Court, at the time this matter was commenced before the District Committee on Inquiry, provided for a presumably independent prosecutor, employed by and answerable to the Nebraska State Bar Association. The structure of the Nebraska State Bar Association was such that the Counsel for Discipline was thought to be subject to the direction and control of the Executive Council of that association. That fact was perceived to create a conflict of interest for counsel for appellant, who is a partner of a member of the Executive Council, of such gravity that appellant's counsel should be compelled to disqualify

himself. That perception was challenged, and the Advisory Commission of the Nebraska State Bar Association ruled that appellant's counsel need not disqualify himself but that Council for Discipline's independence was so called into question that he should withdraw.

Although the rules adopted by the Supreme Court provided a simple, straight forward method for appointment of another member of the Association to prosecute this case, a different action was taken. The record does not reflect how the ruling of the Advisory Committee was brought to the court's attention or who, if anyone, suggested that a different approach be taken, but the court, on its own motion, without hearing or notice, amended its rules transferring authority over Counsel for Discipline from the Bar Association to the Court itself. This was presumed to satisfy the objections of the Advisory Committee. The effect of the rule change, which was to involve the Court directly in the investigative and prosecutorial function was apparently never considered and has only been ruled upon by implication when the court declined to address it.

A member of the Court summoned the Counsel for Discipline to his chambers at a very early stage in the proceedings for an ex parte conference. At that conference, copies of certain readily available public records were furnished to Counsel for Discipline. Those documents were the basis of five of the six charges submitted to the Disciplinary Review Board and of all of the charges which the Disciplinary Review Board found merited further proceedings.

The rules of the Nebraska Supreme Court provide for an appeal from the findings of the Disciplinary Review Board only by the Respondent. Such rulings appear to be final insofar as the Counsel for Discipline is concerned. Yet Counsel for Discipline was permitted by the Court over objection and without opinion to "reinstate" a charge which the Disciplinary Review Board had found was not deserving of further processing.

In accordance with the rules of the Nebraska Supreme Court, respondent tendered a "conditional admission" which was approved and agreed to by Counsel for Discipline. It was considered, and rejected, by the Court without opinion or explanation. After that action, the same judge of the Nebraska Supreme Court made an ex parte contact with Thomas J. Walsh to determine whether Mr. Walsh would be willing to accept appointment as "co-counsel for discipline" to assist in prosecution of this matter. The rules do not provide for appointment of a "co-counsel for discipline" and establish a time limit within which another member of the Association may be appointed by the Court. At a time well beyond that limited by the rules and without regard for the lack of authority for such appointment in the rule the Court, upon its own motion, without application, notice, hearing, or showing of any cause or need, appointed Mr. Walsh.

It then permitted Mr. Walsh to file additional charges well beyond the time limited by its rules for such filing and overruled, without opinion or explanation, objections thereto.

In accordance with the rules, the matter was referred to a referee, an evidentiary hearing was held, the referee's report exonerating the appellant was filed, exceptions were taken to it, and upon review by the Court on the record before the referee, his report was rejected and the appellant was found to be guilty of the charges and subject to discipline.

Virtually every safeguard built into the system was obviated. The independent prosecutor was transferred to the control and direction of the Court. The decision of the impartial and independent Disciplinary Review Board was overturned without authority and without opinion or explanation. The report of the referee was to a large extent rejected and the Court, after a review of the matter on the record before the referee substituted its findings of fact for those of the referee.

The case is further complicated by the fact that it is one of three separate cases to be decided by the Supreme Court of Nebraska involving appellant and arising out of the same general factual situation. The charges and issues in each of the cases was different. It is clear, however, from the earlier opinion of the Supreme Court of Nebraska, *State v. Douglas*, 217 Neb. 199, 394 N.W.2d 870 (1984), that a serious danger exists that at least a majority of that Court reached certain conclusions based upon the record made in the other cases which was necessarily incomplete and inapplicable because of the different issues presented, that appellant had engaged in unethical or unprofessional conduct and should be subjected to discipline in this case.

Such a situation would, of course, raise the serious, if not insurmountable, due process objections of inability to examine and cross-examine witnesses. The Supreme Court of Nebraska has recently recognized these problems in a case where a district judge participated in an *ex parte* conference with the members of the family of a homicide victim prior to imposing sentence. Although the trial judge had addressed the matter and stated on the record that such conference had had no effect upon his decision, the Nebraska Supreme Court found that he should not have proceeded further with the matter and vacated the sentence imposed by him. *State v. Barker*, 227 Neb. 842 (1988).

The Nebraska Court's refusal to recognize or discuss the question presented further demonstrates the danger that appellant's right to due process has been denied or severely infringed.

This case represents a dangerous extension of the rulings in *Withrow*, virtually to the point of overruling or reversing *Murchinson*. It is necessary that this Court now speak as to the appropriate limitations upon *Withrow*, if any.

Respectfully submitted,

WILLIAM E. MORROW
ERICKSON & SEDERSTROM, P.C.
One Merrill Lynch Plaza
10330 Regency Parkway Drive
Omaha, Nebraska 68114
(402) 390-7125

Counsel for Appellant

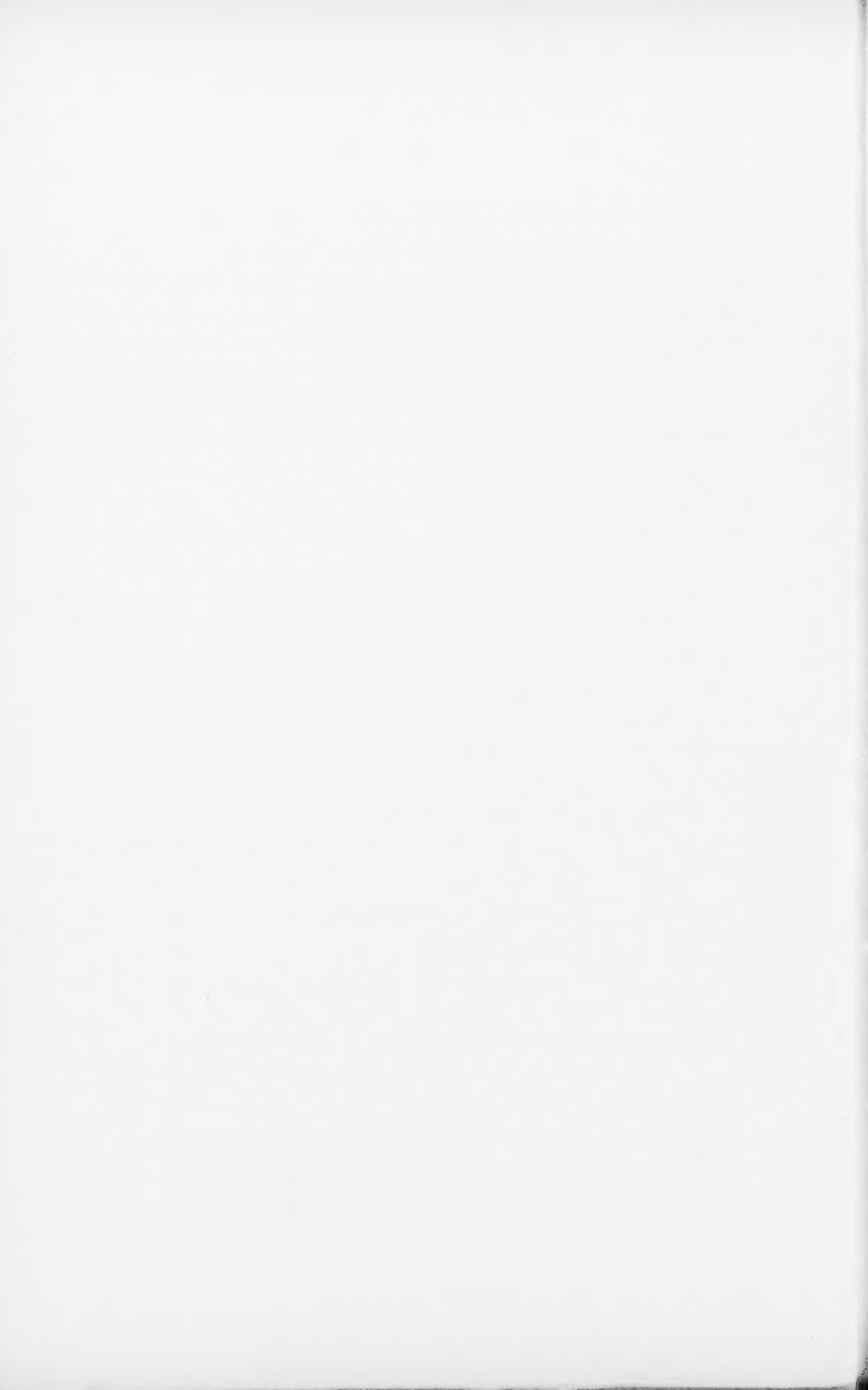


TABLE OF CONTENTS

Page

| | |
|---|------|
| Opinion of Supreme Court of Nebraska | 1a |
| Order on Rehearing..... | 93a |
| Notice of Appeal | 94a |
| Report of Referee | 96a |
| Report before Disciplinary Review Board..... | 209a |
| Amendment to Formal Charge | 223a |
| Formal Charge..... | 224a |
| Objection and Motion To Reinstate Count I..... | 235a |
| Motion To Disqualify Counsel and Strike Filings . | 236a |
| Response To Motion..... | 250a |
| Order of Nebraska Supreme Court..... | 253a |
| Conditional Admission | 254a |
| Declaration of Counsel for Discipline..... | 256a |
| Order of Nebraska Supreme Court..... | 257a |
| Motion To Strike..... | 258a |
| Order of Nebraska Supreme Court..... | 260a |
| Exhibits Admitted at Hearing Before Referee ... | 261a |
| Nebraska Supreme Court Disciplinary Rules.... | 266a |



APPENDIX

OPINION OF THE SUPREME COURT OF NEBRASKA

Case Title

State ex rel. Nebraska State
Bar Association, Relator,

v.

Paul L. Douglas, Respondent.

Case Caption

State ex rel. NSBA v. Douglas

Filed December 4, 1987. No. 85-535.

Original action. Judgment of suspension.

Dennis G. Carlson, Counsel for Discipline, and
Thomas J. Walsh, for relator.

William E. Morrow and Tamra L. Wilson of
Erickson & Sederstrom, P.C., for respondent.

Robert M. Spire, Attorney General, and A. Eugene
Crump, for State of Nebraska.

STATE EX REL. NSBA V. DOUGLAS

NO. 85-535 - filed December 4, 1987.

1. Disciplinary Proceedings: Appeal and Error. A proceeding to discipline an attorney is a trial de novo on the record, in which the Supreme Court reaches a conclusion independent of the findings of the referee, provided, where credible evidence is in conflict on a material issue of fact, the Supreme Court considers and may give weight to the fact that the referee heard and observed the witnesses and accepted one version of the facts rather than another.

2. Disciplinary Proceedings. In a disciplinary proceeding against an attorney, the complaint must be established by clear and convincing evidence.

3. _____. In a disciplinary proceeding against an attorney, the basic issues are whether discipline should be imposed and, if so, the type of discipline appropriate under the circumstances.

4. Miranda Rights. The warning specified in *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), is required only when a law enforcement officer has restricted the freedom of the person interrogated, thereby rendering such person in "custody."

5. Fraud. When a relationship of trust and confidence exists, the fiduciary has the duty to disclose to the beneficiary of that trust all material facts, and failure to do so constitutes fraud.

6. Public Officers and Employees. Throughout the United States, public officers have been characterized as fiduciaries and trustees, charged with honesty and fidelity in administration of their office and execution of their duties.

7. _____. The relationship between a state official and the state is that of principal and agent and trustee and cestui que trust. A public office is a public trust. Such offices are created for the benefit of the public, not for the benefit of the incumbent.

8. Fraud: Intent. Fraud may consist of the omission or concealment of a material fact, if accompanied by the intent to deceive under circumstances which create the opportunity and duty to speak.

9. Fraud. Where one has a duty to speak, but deliberately remains silent, his silence is equivalent to a false representation.

10. Constitutional Law: Public Officers and Employees: Disciplinary Proceedings. The constitutionality of the Nebraska Political Accountability and Disclosure Act, Neb. Rev. Stat. §§ 49-1401 et seq. (Reissue 1984), is generally irrelevant to a disciplinary proceeding. Ordinarily, a respondent has no standing to challenge the act.

11. Disciplinary Proceedings. An attorney may be subjected to disciplinary action for conduct outside the practice of law for which no criminal prosecution has been instituted or conviction had.

12. Fraud. One who furnishes false information to the government in feigned compliance with a statutory requirement cannot defend against prosecution for his fraud by challenging the validity of the requirement itself.

13. Contracts: Intent. A written contract expressed in unambiguous language is not subject to interpretation or construction, and the parties' intention must be determined from its contents alone.

14. Disciplinary Proceedings. Violation of any of the ethical standards relating to the practice of law, or any conduct of an attorney in his professional capacity which tends to bring reproach upon the courts or the legal profession, constitutes grounds for suspension or disbarment.

15. Disciplinary Proceedings: Public Officers and Employees. The conduct of a government attorney is required to be more circumspect than that of a private lawyer. Improper conduct on the part of a government

attorney is more likely to harm the entire system of government in terms of public trust.

16. Disciplinary Proceedings. The determination of what is appropriate discipline requires consideration of the nature of the offenses, the need for deterrence of similar future misconduct by others, maintenance of the reputation of the bar as a whole, protection of the public and clients, the expression of condemnation by society on moral grounds of the prohibited conduct, and justice to the respondent, considering all the circumstances and his present or future fitness to continue in the practice of law.

17. _____. The purpose of a disciplinary proceeding is not so much to punish an attorney as it is to determine, in the public interest, whether he should be permitted to continue to practice law.

Boslaugh, C.J., Pro Tem., Hastings, Shanahan, and Grant, JJ., and Moran and Howard, D. JJ., and Colwell, D.J., Retired. PER CURIAM.

This is a disciplinary proceeding against Paul L. Douglas, respondent, who was admitted to the practice of law in Nebraska on June 18, 1953. He was elected county attorney of Lancaster County, Nebraska, in 1961, and Attorney General of Nebraska in 1975. He held the office of Attorney General until his resignation effective January 2, 1985.

Commencing in 1976 and extending through 1981, the respondent had a number of transactions with Marvin E. Copple, who was developing land for residential purposes in and near Lincoln, Nebraska. Copple was

also an officer and director of Commonwealth Savings Company. The respondent's activities in these matters are the basis for the charges filed against him in this proceeding. These matters were also the basis for articles of impeachment against the respondent, adopted by the Legislature on March 14, 1984, and an indictment returned on June 14, 1984. See, *State v. Douglas*, 217 Neb. 199, 349 N.W.2d 870 (1984); *State v. Douglas*, 222 Neb. 833, 388 N.W.2d 801 (1986).

Although the facts in this case are generally the same as those stated in the impeachment case, there are important differences in the question presented. In the impeachment case the evidence was presented to this court, sitting as an impeachment court, to try the articles of impeachment adopted by the Legislature against Paul Douglas, the Attorney General of Nebraska. By a divided court, respondent was found not guilty of the impeachment charges. The court held that "an impeachment proceeding is to be classed as a criminal prosecution in which the State is required to establish the essential elements of the charge beyond a reasonable doubt." *State v. Douglas, supra*, 217 Neb. at 201, 349 N.W.2d at 874.

In this proceeding, we are reviewing charges that respondent was guilty of misconduct as a lawyer in various described activities set out in the formal disciplinary charges against him. Although some of those charges are similar to the impeachment articles, others are not. As an example, the articles of impeachment made no reference to the Nebraska Political Accountability and Disclosure Act, Neb. Rev. Stat. §§ 49-1401 et seq. (Reissue 1978 & 1984), the violation of which is

the basis for five of the counts alleged in this proceeding.

The standard of proof in this proceeding is proof by clear and convincing evidence, and the question is not whether the respondent was guilty of an impeachable offense, but whether the *conduct* of the respondent violated the Code of Professional Responsibility. The issues to be decided are different; the burden of proof is different; and the evidence presented is different.

Formal charges against the respondent in this matter were filed in this court on July 8, 1985, by the Disciplinary Review Board of the Nebraska State Bar Association. Additional charges were filed on July 24, 1985, and October 7, 1986, by the Counsel for Discipline of the Nebraska State Bar Association.

The respondent's answer was filed on October 8, 1985, and additional answers were filed on October 21, 1986, and November 10, 1986.

On November 4, 1985, Thomas R. Burke was appointed referee.

The complainant's reply was filed on November 12, 1986.

The hearing before the referee commenced on November 18, 1986, and continued for 6 days. Nine volumes of testimony and over 85 exhibits were offered.

The referee filed his report on January 23, 1987. Exceptions to the report of the referee were filed by the Counsel for Discipline on January 28, 1987. Written

briefs were then filed, and the matter was heard in this court on April 24, 1987.

Although the formal charges consisted of 11 counts, the complainant elected to present no evidence in regard to count X. Our opinion, therefore, will discuss only the remaining counts.

The record shows, and the referee found, that in 1976 the respondent and Paul Galter, a friend of the respondent's, agreed with Marvin Copple to assist Copple in the development of a tract of land in Lincoln, Nebraska, that was to be known as Fox Hollow. Copple was a vice president and director of Commonwealth Savings Company, an industrial loan and investment company. Copple was to supply the capital, and the respondent and Galter were to do some of the work, including legal work. The respondent and Galter were to be compensated through an arrangement that involved conveying some of the lots to the respondent and Galter. When Copple found purchasers for the lots, the respondent and Galter were to convey to the purchasers and retain the difference between the price paid by the purchasers and the amount paid to Copple after the lots had been sold.

The respondent and Galter signed three purchase agreements, dated January 12, 1977; September 8, 1977; and June 1, 1979.

The January 12, 1977, agreement described 26 lots, for which the respondent and Galter agreed to pay \$241,774. The agreement acknowledged payment of \$100 per lot and contained provisions requiring payment of the balance due, with interest.

On April 20, 1977, the respondent executed a promissory note and a mortgage in the amount of \$241,774 to Commonwealth. A check from Commonwealth in the amount of \$241,774, payable to the respondent, Galter, and Copple, was endorsed by the respondent and Galter and delivered to Copple.

The September 8, 1977, agreement described 40 lots, with a purchase price of \$320,755. The June 1, 1979, agreement described 12 lots, with a purchase price of \$105,600.

On December 27, 1977, the respondent and Galter received \$371,814 through a transaction arranged by Copple. A Commonwealth check payable to J.A. Driscoll, Copple's secretary, was delivered to the respondent and Galter, who endorsed the check and deposited it in their partnership P.P.S.S.'s account. Copple conveyed 30 of the lots involved in the September 8, 1977, agreement to the respondent, who then conveyed the 30 lots to Driscoll. Copple received \$320,755 of the proceeds by check from P.P.S.S.

On July 20, 1979, Driscoll paid the respondent and Galter \$120,000 for the 12 lots described in the June 1, 1979, agreement. The respondent and Galter then paid Copple \$105,600.

As a result of these transactions, the respondent and Galter each received approximately \$44,772. The respondent also received \$37,500 directly from Copple for his services to Copple in connection with Fox Hollow and another development known as Timber Ridge.

The respondent's activities in regard to the Fox Hollow and Timber Ridge developments included services in connection with an easement for sewerlines across property adjacent to Fox Hollow; obtaining an executive order for installation of utilities; and services in connection with problems regarding a flood plain easement, the construction of a powerline near Fox Hollow, and noise problems resulting from aircraft flights over Timber Ridge.

In 1981 and 1982, Paul Amen, director of the Nebraska Department of Banking and Finance, requested additional legal assistance from the respondent, as Attorney General. An assistant attorney general hired for that purpose left, after 1 week, in late September or early October 1982. At about this time, a Federal Bureau of Investigation agent, John Campbell, advised Amen concerning investigation of matters involving the First Security Bank and Trust of Beatrice, Nebraska. Agent Campbell told Amen that the Beatrice investigation might spill over into Commonwealth. Amen then told the respondent there was a serious need for additional legal assistance, and alluded to the Beatrice investigation and the possible spillover to Commonwealth.

On March 10, 1983, a copy of a letter to Amen from Agent Campbell's supervisor was sent to the respondent. The letter specifically mentioned a more than \$750,000 loan transaction in which the proceeds of the loan went to S.E. Copple, Marvin's father and president of Commonwealth, and none to the "borrower." The March 10 letter was discussed at a meeting in the respondent's office on March 14, 1983. At that time

Amen was attempting to prevent Commonwealth from becoming insolvent.

In early May 1983, Barry Lake, counsel for the Department of Banking, told the respondent that he had information about a transaction in which Marvin Copple had received \$500,000 from Commonwealth, a part of which might constitute theft.

At about this time, respondent assigned Ruth Anne Galter, an assistant attorney general, to the banking department. In June 1983, she mentioned the \$500,000 transaction involving Marvin Copple to the respondent.

On November 1, 1983, Amen declared Commonwealth insolvent. On November 18, 1983, the respondent appointed David A. Domina as a special assistant attorney general to handle matters involving Commonwealth. It was at this time that the respondent determined he was disqualified from handling matters relating to Commonwealth.

On November 30, 1983, Domina examined the respondent under oath concerning his transactions with Copple. When asked what arrangement the respondent had with Copple for compensation for his services with respect to Fox Hollow, the respondent described the lot sale arrangement only. In fact, the respondent had received \$37,500 from Copple, most of which was for his services in regard to Fox Hollow.

In a letter to Richard G. Kopf, special counsel for the Special Commonwealth Committee of the Legislature, dated February 6, 1984, the respondent admitted

that he had received a total of \$77,272.11 for his services for more than 1,500 hours of work over a period of 5 years.

At a hearing before the Special Commonwealth Committee on February 24 or 25, 1984, the respondent admitted that he knew the purpose of Domina's questions on November 30, 1983, and that he should have supplied Domina with the information concerning the money he had received from Copple.

Additional facts will be discussed in the analysis relating to particular counts.

A proceeding to discipline an attorney is a trial de novo on the record, in which the Supreme Court reaches a conclusion independent of the findings of the referee, provided, where credible evidence is in conflict on a material issue of fact, the Supreme Court considers and may give weight to the fact that the referee heard and observed the witnesses and accepted one version of the facts rather than another. See, *State ex rel. Nebraska State Bar Association v. Walsh*, 206 Neb. 737, 294 N.W.2d 873 (1980); *State ex rel. Nebraska State Bar Assn. v. Jensen*, 171 Neb. 1, 105 N.W.2d 459 (1960). Cf. *Hughes v. Enterprise Irrigation Dist.*, 226 Neb. 230, 410 N.W.2d 494 (1987).

In its de novo review of the record in a disciplinary proceeding against an attorney, and to sustain a particular complaint against an attorney, the Supreme Court must find that the complaint has been established by clear and convincing evidence. *State ex rel. NSBA v. Roubicek*, 225 Neb. 509, 406 N.W.2d 644 (1987); *State ex rel. NSBA v. Kelly*, 221 Neb. 8, 374 N.W.2d 833

(1985); *State ex rel. Nebraska State Bar Assn. v. Michaelis*, 210 Neb. 545, 316 N.W.2d 46 (1982). We have referred to this standard of proof as “ ‘a clear preponderance of the evidence’ ” See *State ex rel. NSBA v. Kelly*, *supra* at 12, 374 N.W.2d at 836.

In a disciplinary proceeding against an attorney, the basic issues are whether discipline should be imposed and, if so, the type of discipline appropriate under the circumstances. *State ex rel. NSBA v. Roubicek*, *supra*; *State ex rel. NSBA v. Kelly*, *supra*.

The Code of Professional Responsibility Responsibility (Code) originally adopted by this court in 1970, as amended, consists of nine basic canons, supplemented by ethical considerations (EC) and disciplinary rules (DR). All of the counts allege a violation of one or more of the following subsections of Canon 1, DR 1-102, of the Code:

(A) A lawyer shall not:

(1) Violate a Disciplinary Rule.

. . . .

(3) Engage in illegal conduct involving moral turpitude.

(4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

(5) Engage in conduct that is prejudicial to the administration of justice.

(6) Engage in any other conduct that adversely reflects on his fitness to practice law.

All of the counts also allege a violation of the respondent's oath as an attorney, as set out in Neb. Rev. Stat. § 7-104 (Reissue 1983).

COUNT I

In its "formal charge" against respondent, the Committee on Inquiry of the Second Disciplinary District alleged:

COUNT I

1. From the year 1977 to and including 1980, Paul L. Douglas, the Respondent, purchased real estate from the said Marvin E. Copple and provided to him consulting and legal services regarding various land developments undertaken by the said Marvin E. Copple.

2. That in the sworn statements of November 30, 1983, and December 12, 1983, hereinabove referred to, which were given and made by the said Paul L. Douglas, Respondent, he was asked numerous questions by the said David A. Domina, Special Assistant Attorney General of the State of Nebraska, concerning compensation and legal fees received by Paul L. Douglas, Respondent, from the said Marvin E. Copple; that in said sworn statements, Paul L. Douglas, Respondent, knowingly and intentionally failed to disclose to said David A. Domina, Special Assistant Attorney General of the State of Nebraska, that he, the Respondent, had actually received compensation and legal fees from the said Marvin E. Copple during the years 1977 to and including 1980, in the aggregate amount of \$37,500.00.

3. That the above alleged acts of the Respondent, as set forth in this Count I, constitute a violation of the oath of office of an attorney taken

by the said Respondent at the time he was admitted to practice law in the State of Nebraska, as set forth in Section 7-104, Revised Statutes of Nebraska, 1943, and all of which were and are a violation of the following provisions of the Code of Professional Responsibility adopted by the Supreme Court of the State of Nebraska on May 1, 1970, and as subsequently amended, to wit:

DR 1-102 Misconduct.

(A) A lawyer shall not:

(1) Violate a Disciplinary Rule.

(3) Engage in illegal conduct involving moral turpitude.

(4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

(6) Engage in any other conduct that adversely reflects on his fitness to practice law.

Sometime before his election as Attorney General, respondent and Paul Galter, an attorney and friend of respondent's, had borrowed from four banks to cover a \$40,000 loss sustained in their joint venture for trading in the commodities market. The bank loans were still unpaid in 1976, after respondent became Attorney General. As related by Galter:

I had also had a business venture with Paul [respondent] in the commodity market that had been ongoing for several years which had resulted in losses to both of us, and I thought that - and I know that Paul was looking for some type of outside activity to supplement his own regular income

as the Attorney General so that he could repay that loss.

In April 1976, Marvin Copple had purchased undeveloped farmland, later known as Fox Hollow, and had used the services of Galter in acquisition of that farmland. Copple anticipated 230 lots in the proposed residential development of the farmland and 697 lots in a contemplated total development which would include other land. According to Copple, Galter, as Copple's attorney, suggested that "we include General Paul Douglas in on it and that he would - that Paul Douglas would be a good team member to help with the problems that would be coming up." Copple met with Galter and respondent, and, after discussing the prospective real estate development, later reached a "mutual agreement that [Galter and respondent] would be compensated for the work that they did," when lots sold by Copple at a "discount" to Galter and respondent would be resold at a higher price with the "profit" split between Galter and respondent. While Galter did legal research regarding the development, respondent's "role was primarily to counsel with [Copple and Galter]; come up with the ideas and work on whatever matters needed to be developed." According to respondent, at an unspecified time during such relationship, respondent and Copple agreed that respondent "ought to be compensated for work - as work was completed at a - at a price that [we] agreed that I [respondent] should be compensated." Thereafter, as different projects were completed, Copple paid respondent for work done regarding the real estate developments.

Respondent's work for Copple related to three Fox Hollows (Fox Hollow Addition, Fox Hollow First, and Fox Hollow Second) and another Copple development, Timber Ridge. Although respondent never submitted a bill or statement for services rendered, he told Copple the things he was doing or had done involving Copple's developments, and Copple would then issue a check to pay respondent.

In 1978, Copple paid respondent \$5,000 for work pertaining to storm sewers in Fox Hollow. In his federal income tax return for 1978, respondent reported total taxable income of \$40,687, including his salary of \$32,500 as Attorney General and \$5,000 as a "management fee" from an unidentified source. During 1979, respondent assisted Copple by monitoring eminent domain proceedings by the city of Lincoln to acquire a municipal easement which benefited Fox Hollow in the form of sewer and utility service for the development. For services regarding the easement, Copple paid respondent \$5,000 on April 12, 1979. Later in 1979, respondent did additional work for Copple which pertained to Timber Ridge and a noise problem caused by military aircraft flying over the development. Respondent communicated with the commander of Offutt Air Force Base and received information about military use of the Lincoln airport near Timber Ridge. On September 5, 1979, Copple paid respondent \$7,500 for work on Timber Ridge. Respondent's federal tax return for 1979 showed total taxable income of \$64,562, including his salary as Attorney General in the amount of \$39,500 and a management fee (source unidentified) of \$12,500. In 1980, respondent represented Copple concerning a

flood plain easement regarding Fox Hollow. That representation involved contacts with lawyers for the U.S. Corps of Engineers and with the U.S. attorney for Nebraska. As reimbursement for expenses incurred regarding the Timber Ridge development, Copple paid respondent \$2,500 on April 25, 1980. On August 29, 1980, Copple issued a check for \$5,000 payable to respondent for work relative to the Corps of Engineers and the flood plain pertaining to Fox Hollow. By an additional check, Copple paid respondent \$15,000 on December 23, 1980, for the flood plain matter. In his federal income tax return for 1980, respondent reported total taxable income of \$51,681, including his Attorney General's salary of \$39,500 and \$15,000 as a management fee from an unidentified source. Therefore, for respondent's services rendered on Copple's two real estate developments, Fox Hollow and Timber Ridge, during the period from 1978 to 1980, Copple, by five checks, paid respondent the aggregate sum of \$37,500, of which \$30,000 related to work on Fox Hollow and \$7,500 to work on Timber Ridge.

After Commonwealth Savings Company was declared insolvent in November of 1983, David A. Domina was appointed by respondent as a special assistant attorney general for the State of Nebraska to investigate the circumstances surrounding the financial collapse of Commonwealth. In a transcribed interview conducted on November 30, 1983, at the offices of the Attorney General in the State Capitol, respondent acknowledged that he was Nebraska's Attorney General, and, after the *Miranda* warning was stated to respondent, see *Miranda v. Arizona*, 384 U.S. 436, 86 S.

Ct. 1602, 16 L. Ed. 2d 694 (1966), the following questions were asked by Domina, with answers given by respondent:

Q. Did you serve as counsel in connection with [Timber Ridge] development and receive compensation?

A. Yes.

Q. Were there other developments in addition to the Fox Hollow and Timber Ridge in which you served as counsel for Marv Copple or any of the Copple family?

A. First of all, I did no other business with anybody else in the Copple family except Marv.

Q. All right. Were there other developments, then, besides Fox Hollow and Timber Ridge for which you were paid for services as counsel?

A. There was always something coming up, and as it was requiring my time and my counsel – and I would remind him of it and periodically – he would pay me for it

. . . .

Q. Did you ever specifically bill Mr. Copple for your counsel on these other projects other than Fox Hollow and Timber Ridge?

A. No.

Q. Did you ever give him orally, you know, a figure or ask for a specific amount of compensation on those other projects?

A. No.

Q. How did he pay you for your services on the projects other than Fox Hollow and Timber Ridge or did he?

A. He never did pay me.

Q. With respect to Fox Hollow, then, what was the arrangement that you had with Mr. Copple for compensation for your services as counsel, then?

To the last question asked by Domina, respondent again stated the plan whereby he and Galter acquired lots from Copple at a reduced price, or "discount," and expected to resell those lots at a price greater than the purchase price, thereby making a profit which would "compensate us for the work that we had done helping Marvin develop those lots."

Domina then continued the questioning:

Q. Okay. I want to be sure that I understand the terms of the compensation on that arrangement and then I can go on to something else here

. . . .

A. [Marvin Copple] was more than willing to share that profit and to compensate people for – for the money that he was making with the people that helped him put it together

. . . .

. . . . I was confident that he would compensate us well because he was going to have to – if he didn't compensate us well for it, it was all going to go to taxes anyway. But I think it was a way, and I didn't – you know, if he did it by the lot or if he just paid us in cash, he would have had the same tax problem. I don't think he – he saw that solve any of his tax problems by doing it with contracts.

In the course of the November 30 interview, respondent mentioned his dissatisfaction expressed to Marvin

Copple concerning compensation derived from resale of the lots. Respondent then stated that Copple had told him not to worry about the situation, because the profit on resale of the lots would "well compensate us for the services that we had rendered" regarding the Copple real estate developments.

A second interview of respondent was conducted by Domina at the Capitol on December 12, 1983. Domina renewed his inquiry into respondent's involvement in Copple's real estate developments and compensation for services rendered to Copple. When Domina asked a question concerning respondent's interest in Timber Ridge, the following transpired:

Q. You were going to get a fractional interest in the whole tract?

A. That's correct.

Q. What was the fraction?

A. Ten percent -

Q. For you and ten percent for Galter?

A. Correct.

Q. Was that his compensation for your work and its development?

A. And there was a lot more work to be done to develop it, yes.

Q. But it was compensation?

A. Yes.

Q. So, in that connection the arrangements were the same as the Fox Hollow -

A. No, no. No, there wasn't going to be anything the way Fox Hollow was done.

With Fox Hollow what we did was we bought lots at a lower price and then made whatever

amount of profit we were going to make from the sale of the lots.

Q. I thought I understood you to say in your first statement that you were allowed to get into the Fox Hollow deal as compensation for consultation services?

A. Yes. But I mean I didn't give a percentage. I didn't get a percentage.

Q. But you were allowed to buy lots without investing any money?

A. Right. But on this one we were going to get a percentage.

Q. Okay. Instead of specific lots

A. Yes.

Q. You were to get an undivided 10th interest in exchange for your services?

A. Yes.

Q. But at Fox Hollow you had specific lots?

A. That I had to buy.

On February 6, 1984, respondent wrote a letter to Richard G. Kopf, special counsel for the Special Commonwealth Committee of the Nebraska Legislature. In that letter, which respondent signed as Attorney General, he reiterated the compensation arrangement with Copple, that is, Copple "was willing to compensate us for our services by allowing us to participate in the profits of future lot sales." In his letter to Kopf, respondent also wrote:

I received compensation in the form of reduced price purchases of Fox Hollow lots, money, and a, to date un conveyed, 10% interest in Timber Ridge.

The interest in Timber Ridge will not now be conveyed and is of questionable value in any event. That compensation was paid to me in accordance with the general agreement and understanding between Paul Galter, myself and Marvin Copple. As the course of dealings proceeded, the oral agreement and the method of compensation was changed.

Later, in his letter of February 6 to Kopf, respondent stated:

Although I advised Mr. Domina that Marvin Copple made payments to me from time to time, no one has ever asked me whether or not the only payments I received for my services in connection with all the real estate developments in which Paul Galter, Marvin Copple and I were involved were received as profits from the lot sales. Because of the extensive additional work which I did and in which Paul Galter had little participation relating to the noise problems, alternative construction methods, the flowage easement and miscellaneous other matters, I was paid a total of \$32,500 during 1978, 1979 and 1980. For more than 1,500 hours of work over a period of five years, I received a total of \$77,272.11.

At a hearing before the Special Commonwealth Committee on February 24, 1984, respondent referred to the Domina interviews and told the committee:

I wish I would have told them about the extra 32 five. I didn't, but that hardly puts me in the role that he says that I belong in, but interestingly enough, on his examination of me, he asked me this

question: "All right. Were there other developments, then, besides Fox Hollow and Timber Ridge for which you were paid for services as counsel"? That was the question. "Were there other developments besides Fox Hollow and Timber Ridge for which you were paid for services as counsel", and I responded, "There was always something coming up, and it required my time and counsel. I would remind him of it periodically; he would pay me for it". Now, he didn't pursue that. It is quite obvious that I didn't volunteer it, and I should have.

On the next - Later on on that page, he asks the question slightly different, and I played the part of the lawyer and answered his question. Again, I say, I should have told him. "Did you especially bill Mr. Copple for your counsel on these other projects other than Fox Hollow and Timber Ridge"? And the answer was, "No", and that is a correct answer, but I knew what he wanted. "Did you ever give him orally, you know, a figure or ask for a specific amount for compensation on these projects"? The answer was, "No". "How did he pay you for your services on the project other than Fox Hollow? How did he pay you for your services on the projects other than Fox Hollow and Timber Ridge, or did he"? I answered the first part of the question by saying, "He never did pay me", meaning he never did pay me for projects other than Fox Hollow and Timber Ridge, and I realize that when I got my statement, and one of the first things we talked about, and one of the things that I did in the two-week period of time was to put it in the report,

not only put it in that I had gotten paid, but tell you the exact amount of money that I made.

In the course of the legislative hearing, and in response to interrogation by special counsel Kopf concerning nondisclosure of fees paid by Copple, respondent remarked:

Every time this investigation moves along, it seems like there is always another little matter that seems to be the great big focal point. All of a sudden, it seems like the whole purpose of this 16-man committee – 16-person committee – excuse me – is why I didn't disclose the 32 five

In further questioning by Kopf concerning the Domina interview of November 30, 1983, and respondent's failure to mention the "fees" paid by Copple, respondent responded: "You are saying to me, why didn't you volunteer more than the answer to the question, and I have told you, I'm sorry. I wish I would have, and I should have. I admit that."

In June 1984, a newspaper article listed the checks from Marvin Copple to Douglas. The total of those checks was \$37,500, not \$32,500 as previously mentioned by respondent in his letter to Kopf and in his statements before the special legislative committee. By reviewing his bank statements, respondent verified the payments by Copple, filed an amended income tax return for 1980, and stated that he honestly believed his total "additional compensation was thirty-two five, where in fact it was thirty-seven five." In his amended

tax return for 1980, respondent also explained the previously omitted payment from Copple: "During the taxable year 1980, the taxpayer received a check for \$5,000.00 from Marvin Copple. It has subsequently been determined that this amount is earned income."

Respondent resigned as Attorney General on January 2, 1985.

In proceedings before the referee appointed for the disciplinary process now under examination, respondent was questioned about the Domina interview of November 30, 1983:

Q. . . . And was it in a statement that Mr. Domina asked you about your compensation, and you didn't him tell [sic] about - about the thirty-seven five?

A. That's not true at all.

Q. Did you tell him about the thirty-seven five?

A. I did not.

Q. Did you later testify that you knew what he wanted, but you decided to play lawyer, and you just didn't tell him about it?

A. That's true.

At the hearing before the referee, respondent also acknowledged that he had been paid \$5,000 in 1978, \$12,500 in 1979, and \$20,000 in 1980, or payments in the total of \$37,500, as compensation for services rendered concerning the Copple real estate developments, and that moneys retained from the "lot transactions" as well as the \$37,500 paid by Copple were "compensation for services rendered" for Marvin Copple.

In his report, the referee made the following findings:

7. Marvin Copple, Paul Galter, and the Respondent agreed orally that Galter and the Respondent would be compensated for their services with respect to the Fox Hollow development by means of an arrangement by which Copple would convey certain lots in the development to Galter and the Respondent at specified prices, and, once Copple had found third-party purchasers for the lots, Galter and the Respondent would convey the lots to the third parties, pay to Copple the original purchase price, and retain the balance as compensation for services to Copple

. . . .

14. In addition to profits from lot sales, the Respondent asked Marvin Copple to pay him directly for services related to Copple's real estate developments. Copple write [sic] six checks to the Respondent in the following amounts:

| | |
|-------------------|-------------|
| December 19, 1978 | \$ 5,000.00 |
| April 12, 1979 | 5,000.00 |
| September 5, 1979 | 7,500.00 |
| April 25, 1980 | 2,500.00 |
| August 29, 1980 | 5,000.00 |
| December 27, 1980 | 15,000.00 |

The total of the six checks was \$40,000. The April 25, 1980 check for \$2,500 apparently was for the purpose of reimbursement for expenses related to the Timber Ridge development The Respondent retained the proceeds from the other five

checks, in a total amount of \$37,500, for compensation for his services on various aspects of the Fox Hollow and Timber Ridge developments.

. . . .

25. On November 30, 1983, David Domina asked if there were developments "besides Fox Hollow and Timber Ridge for which you were paid for services as counsel?" The Respondent answered, "There was always something coming up, and as it was requiring my time and my counsel - and I would remind him of it and periodically - he would pay me for it." . . . Domina then asked, "Did you ever specifically bill Mr. Copple for your counsel on these other projects other than Fox Hollow and Timber Ridge?" . . . Answer: "No." Question: "Did you ever give him orally, you know, a figure or ask for a specific amount of compensation on those other projects?" Answer: "No." Question: "How did he pay you for your services on the projects other than Fox Hollow and Timber Ridge or did he?" Answer: "He never did pay me." . . . Question: "With respect to Fox Hollow, then, what was the arrangement that you had with Mr. Copple for compensation for your services as counsel, then?" . . . The Respondent answered by describing the lot purchase agreements and the manner in which he and Paul Galter were paid by the sale of lots. The Respondent was not asked specifically and did not tell Domina in response to this series of questions . . . that he received compensation for work on Fox Hollow and Timber Ridge by means of checks written to him by Marvin Copple. The only question

by Domina to which discussion of the Copple checks would have been a responsive answer was the question ["With respect to Fox Hollow, then, what was the arrangement that you had with Mr. Copple for compensation for your services as counsel, then?"].

26. On December 12, David Domina asked the Respondent what his interest in Timber Ridge was. The Respondent replied that Marvin Copple had agreed that when the property was platted, the Respondent and Paul Galter each would receive a 10 percent ownership interest as compensation for their work on its development. . . . Domina did not ask whether the Respondent actually received the 10 percent interest or if he received any other form of compensation for work on Timber Ridge. Instead, Domina asked whether the Timber Ridge compensation plan was the same as for Fox Hollow, to which the Respondent replied that it was not. The Respondent was not asked for, nor did he volunteer, the information that instead of an ownership interest in Timber Ridge, he received direct payments by check from Marvin Copple.

. . . .

29. There is no direct evidence that the Respondent intended to conceal from David Domina the fact that the Respondent had received direct payments from Marvin Copple for his work on Copple's real estate developments. Although the Respondent bypassed opportunities during the November 30 and December 12, 1983 questioning to reveal details of the direct payments from Copple - he did state that Copple paid him . . . - and although his

answer to the question concerning compensation for Fox Hollow work . . . discussed only the lot transactions and did not include the direct payments by check, I conclude that the Respondent did not intentionally withhold that information from Domina. The Respondent reasonably could have perceived that the November 30 and December 12, 1983 statements were being taken in an adversarial context and that his responses could be used against him. . . . It is apparent from the Respondent's willingness to answer other questions put to him by Domina that he would have disclosed his receipt of direct payments from Copple had Domina followed up the several opportunities he had to ask more specific questions about compensation other than the lot arrangements.

In his report, the referee concluded:

Count I: Nondisclosure of Direct Payments

The Relator, in Count I, charges that the Respondent violated DR 1-102 when he failed to disclose, during his two sworn statements to David Domina, that he had received a total of \$37,500 from Marvin Copple in compensation and legal fees from 1977 to 1980.

The transcripts of the statements to Domina show, and the Respondent admits, that the Respondent did not at that time tell Domina that he had received direct payments by check for his work for Copple in addition to the compensation paid by means of the discounted purchase and resale of 78 lots in the Fox Hollow development. However, Domina asked only one question during two questioning

sessions that actually called for disclosure of direct compensation for work on the Fox Hollow or Timber Ridge developments. All other questions going to compensation were specifically addressed to projects other than Fox Hollow and Timber Ridge or were restricted in scope to the plan for compensation by purchase and resale of Fox Hollow lots. Each of these other questions were [sic] answered within the scope of the questions, but not beyond. The one question Domina asked that was broad enough to encompass direct payments: "With respect to Fox Hollow, then, what was the arrangement for your services as counsel, then?" . . .

. . . .

The difficulty on this count is determining whether the Respondent should be held to the duties of his public role at the time of the questioning by Domina or should be afforded the latitude allowed one whose conduct is under investigation and who may be subject to prosecution. If his duties to aid the investigation were paramount at the time of his statements to Domina, the Respondent should have disclosed what he knew Domina wished to know, even if not specifically asked for the information. But if his public role did not control the situation, the Respondent properly could have "played the lawyer" and answered only the questions actually asked.

. . . [T]he proper characterization of the Respondent's role in answering potentially inculpatory questions was that of a suspect being interviewed by a prosecutor rather than that of the chief

prosecutor assisting an investigation by another servant of the public interest. In that context, the Respondent cannot appropriately be held to the fiduciary duties he owed the public with respect to matters on which he actively represented the State's interests, and it was legally and ethically permissible for him to answer questions truthfully and completely, within the restraints of the give-and-take of live questioning, without volunteering information not requested.

. . . .
 . . . I am unable to find by a clear preponderance of the evidence that the Respondent acted deceptively when he failed to disclose to David Domina in late 1983 the amount of money paid to him directly by Marvin Copple.

In reaching his conclusion that respondent was not obligated to disclose the nature of all compensation derived from Copple, the referee makes veiled reference to a suspect's privilege against self-incrimination during custodial interrogation, see *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), and the proscription against postarrest silence, pursuant to the *Miranda* warning, used as evidence. See *Doyle v. Ohio*, 426 U.S. 610, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976), wherein the U.S. Supreme Court held that "use for impeachment purposes of [an arrestee's] silence, at the time of arrest and after receiving *Miranda* warnings, violated the Due Process Clause of the Fourteenth Amendment." 426 U.S. at 619.

Therefore, we must dispel any misconception that nondisclosure by respondent was justified pursuant to

Miranda v. Arizona, *supra*, where the U.S. Supreme Court reviewed various aspects of a suspect's custodial interrogation by police or law enforcement personnel, namely, "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." 384 U.S. at 444. See, also, *Oregon v. Mathiason*, 429 U.S. 492, 97 S. Ct. 711, 50 L. Ed. 2d 714 (1977). The warning specified in *Miranda v. Arizona*, *supra*, is required only when a law enforcement officer has restricted the freedom of the person interrogated, thereby rendering such person in "custody." See *State v. Brown*, 225 Neb. 418, 405 N.W.2d 600 (1987). If the person to be questioned is not in custody, the *Miranda* warning is not required before interrogation. See *State v. Bodtke*, 219 Neb. 504, 363 N.W.2d 917 (1985). Nothing in the record indicates that respondent, who was being interviewed in his office at the State Capitol, was in any manner deprived of his freedom in any significant way, before or during the interrogation by Special Assistant Attorney General Domina. We do, therefore, disagree with the referee's view of respondent as a "suspect being interviewed by a prosecutor rather than that of the chief prosecutor assisting an investigation by another servant of the public interest," that is, characterization of respondent as a suspect subjected to custodial interrogation by law enforcement personnel, thereby triggering the safeguards in the *Miranda* warning, including the privilege of silence as a means to avoid a suspect's inculpatory statement. Because custodial interrogation is absent in the present case, we need not consider whether silence, existing by

virtue of the *Miranda* warning, may be used as evidence in civil proceedings such as respondent's case now before this court.

We now address the question whether respondent had the duty to disclose information concerning all compensation, including payment of fees, which he received from Copple. When he received such payments from Copple, and was later interviewed by Domina, respondent was the elected Attorney General of the State of Nebraska. Count I of the complaint against respondent does not restrict the charge to an affirmative misrepresentation, such as a statement consisting of an actual misrepresentation of fact. The charge in count I embodies, in part, an allegation that respondent engaged in conduct which involved "dishonesty, fraud, deceit, or misrepresentation."

"Although the general rule is that 'one party to a transaction has no duty to disclose material facts to the other,' and [sic] exception to this rule is made when the parties are in a fiduciary relationship with each other." *Midland Nat. Bank, etc. v. Perranoski*, 299 N.W.2d 404, 413 (Minn. 1980). See, also, *Callahan v Callahan*, 127 A.D.2d 298, 514 N.Y.S.2d 819 (1987). When a relationship of trust and confidence exists, the fiduciary has the duty to disclose to the beneficiary of that trust all material facts, and failure to do so constitutes fraud. See 37 C.J.S. *Fraud* § 16d (1943).

Regarding the law of trusts and disclosure by a fiduciary, we have said:

"It is the duty of a trustee to fully inform the cestui que trust [beneficiary] of *all* facts relating to the

subject matter of the trust which come to the knowledge of the trustee and which are material to the cestui que trust to know for the protection of his interest."

(Emphasis supplied.) *Johnson v. Richards*, 155 Neb. 552, 566-67, 52 N.W.2d 737, 746 (1952). See, also, *St. Paul Fire & Marine Ins. Co. v. Truesdell Distributing Corp.*, 207 Neb. 153, 296 N.W.2d 479 (1980).

Throughout the United States, public officers have been characterized as fiduciaries and trustees, charged with honesty and fidelity in administration of their office and execution of their duties. See, *Driscoll v. Burlington-Bristol Bridge Co.*, 8 N.J. 433, 86 A.2d 201 (1952); *Marshall Impeachment Case*, 363 Pa. 326, 69 A.2d 619 (1949); *Fuchs v. Bidwill*, 31 Ill. App. 3d 567, 334 N.E.2d 117 (1975); *Jersey City v. Hague*, 18 N.J. 584, 115 A.2d 8 (1955); *Matter of Parsons v. Steingut*, 185 Misc. 323, 57 N.Y.S.2d 663 (1945). See, also, *People v. Savaiano*, 66 Ill. 2d 7, 15, 359 N.E.2d 475, 480 (1976) (member of county board; public officials "owe a fiduciary duty to the people they represent"); *Williams v. State*, 83 Ariz. 34, 36-37, 315 P.2d 981, 983 (1957) (state land commissioner; "The relationship between a state official and the state is that of principal and agent and trustee and cestui que trust"); *In re Removal of Mesenbrink as Sheriff*, 211 Minn. 114, 117, 300 N.W. 398, 400 (1941) (sheriff; "A public office is a public trust. Such offices are created for the benefit of the public, not for the benefit of the incumbent").

"An affirmative statement is not always required, however, and fraud may consist of the omission or concealment of a material fact if accompanied by the intent to deceive under circumstances which create the opportunity and duty to speak." *Tan v. Boyke*, 156 Ill. App. 3d 49, ___, 508 N.E.2d 390, 393 (1987). See, also, *Krueger v. St. Joseph's Hospital*, 305 N.W.2d 18 (N.D. 1981) (fraud may arise not only from misrepresentation but from concealment as well, where there is suppression of facts which one party has a legal or equitable obligation to communicate to another). "Concealment" means non-disclosure when a party has a duty to disclose. See *Reed v. King*, 145 Cal. App. 3d 261, 193 Cal. Rptr. 130 (1983). "Conceal means to hide, secrete, or withhold from knowledge of others" *State v. Copple*, 224 Neb. 672, 691, 401 N.W.2d 141, 155 (1987). See, also, *Nelson v. Cheney*, 224 Neb. 756, 401 N.W.2d 472 (1987); *Christopher v. Evans*, 219 Neb. 51, 361 N.W.2d 193 (1985). "The word *conceal* pertains to affirmative action likely to prevent or intended to prevent knowledge of a fact" *State v. Copple, supra*.

It is a general principle in the law of fraud that where there is a duty to speak, the disclosure must be full and complete. It is firmly established that a partial and fragmentary disclosure, accompanied with the wilful concealment of material and qualifying facts, is not a true statement, and is as much a fraud as an actual misrepresentation, which, in effect, it is. Telling half a truth has been declared to be equivalent to concealing the other half. Even though one is under no obligation to speak as to a matter, if he undertakes to do so, either voluntarily

or in response to inquiries, he is bound not only to state truly what he tells, but also not to suppress or conceal any facts within his knowledge which will materially qualify those stated. If he speaks at all, he must make a full and fair disclosure. Therefore, if one wilfully conceals and suppresses such facts and thereby leads the other party to believe that the matters to which the statements made relate are different from what they actually are, he is guilty of a fraudulent concealment.

37 Am. Jur. 2d *Fraud and Deceit* § 151 at 208-09 (1968).

Moreover, where one has a duty to speak, but deliberately remains silent, his silence is equivalent to a false representation. See, *Security St. Bk. of Howard Lake v. Dieltz*, 408 N.W.2d 186 (Minn. App. 1987); *Callahan v. Callahan*, 127 A.D.2d 298, 514 N.Y.S.2d 819 (1987); *Holcomb v. Zinke*, 365 N.W.2d 507 (N.D. 1985); *Anderson v. Anderson*, 620 S.W.2d 815 (Tex. Civ. App. 1981); 37 C.J.S. *Fraud* § 16a (1943).

In passing upon the propriety of action by a commission council, the Supreme Court of Louisiana, in *Plaquemines Par. Com'n Council v. Delta Dev.*, 502 So. 2d 1034, 1039-40 (La. 1987), stated: "Public officials occupy positions of public trust The duty imposed on a fiduciary embraces the obligation to render a full and fair disclosure to the beneficiary of all facts which materially affect his rights and interests."

As expressed in *U.S. v. Holzer*, 816 F.2d 304, 307 (7th Cir. 1987): "A public official is a fiduciary toward the public . . . and if he deliberately conceals material information from them he is guilty of fraud."

"To reveal some information on a subject triggers the duty to reveal all known material facts." *Hendren v. Allstate Ins. Co.*, 100 N.M. 506, 511, 672 P.2d 1137, 1142 (1983). See, also, *Ingaharro v. Blanchette*, 122 N.H. 54, 440 A.2d 445 (1982); *Wirth v. Commercial Resources, Inc.*, 96 N.M. 340, 630 P.2d 292 (1981); *Shaver v. Monroe Construction Co.*, 63 N.C. App. 605, 306 S.E.2d 519 (1983).

As expressed in 37 Am. Jur. 2d, *supra*, § 150 at 207-08:

A party of whom inquiry is made concerning the facts involved in a transaction must not, according to well-settled principles, conceal or fail to disclose any pertinent or material information in replying thereto, or he will be chargeable with fraud. The reason for the rule is simple and precise. Where one responds to an inquiry, it is his duty to impart correct information. Thus, one who responds to an inquiry is guilty of fraud if he denies all knowledge of a fact which he knows to exist; if he gives equivocal, evasive, or misleading answers calculated to convey a false impression, even though they are literally true as far as they go; or if he fails to disclose the whole truth.

When the Domina interviews of respondent are taken in conjunction with respondent's letter to Kopf (special legislative counsel) and with respondent's statements made during the hearing before the special legislative committee, there is no doubt that respondent fully realized that Domina was seeking information about all respondent's compensation from Copple

in connection with the Fox Hollow and Timber Ridge developments. Although respondent mentioned only anticipated profits on resale of lots in Fox Hollow and the unconveyed fractional interest in Timber Ridge as his compensation for services rendered to Copple, respondent later acknowledged he was "paid a total of \$32,500 [actually \$37,500] during 1978, 1979, and 1980." In reference to the Domina interviews, respondent expressed: "I wish I would have told them about the extra 32 five . . . I knew what [Domina] wanted." What Domina was seeking during the respondent's interviews was factual information about all the compensation which respondent had received from Copple for services rendered by respondent, which necessarily included not only compensation in the form of respondent's interests in the two real estate developments but, also, fees paid by Copple. Yet respondent "played the part of the lawyer" and responded to Domina's questions with answers which created the desired and false impression that, in exchange for legal services rendered for Copple, respondent's only compensation was an unconveyed 10-percent interest in one development (Timber Ridge) and prospective resale of the underpriced lots which respondent had acquired in another development (Fox Hollow). In that manner, respondent withheld disclosure of the fees paid directly by Copple and, thus, concealed facts concerning compensation which he had received from Copple. By such half-truths resulting from partial disclosures, respondent's deliberate distortion of the truth was a deceitful suppression of facts known to respondent, and constituted fraud by concealment. As Attorney General of the

State of Nebraska, respondent was required to carry out that public office with honesty and fidelity, which included the duty to make full and truthful disclosures regarding his conduct while in such position of public trust. Moreover, as an elected official charged with a public trust, respondent had neither the luxury nor the liberty of selective nondisclosure, when questioned about his conduct and activity occurring while he held the office of Attorney General.

We find that respondent, as Attorney General of the State of Nebraska, was a public official, who was obligated, as part of his duties, to make full and truthful disclosure of all information sought in the course of the interviews concerning his compensation received from Copple. We further find, by clear and convincing evidence, that respondent, by nondisclosure of information and as the result of equivocal, evasive, or misleading answers given during the interviews by Domina, did fraudulently conceal the fact that respondent had been paid \$37,500 by Copple as compensation for respondent's services regarding Copple's real estate developments. Therefore, contrary to the finding and disposition made by the referee, we conclude that count I, namely, that respondent did "[e]ngage in conduct involving dishonesty, fraud, deceit, or misrepresentation" in violation of DR 1-102(A) (4), has been established. Under the circumstances it is unnecessary that we further determine whether respondent is guilty of professional misconduct involving moral turpitude, in violation of DR 1-102(A) (3), or is guilty of any other conduct that adversely reflects on his fitness to practice law, as prohibited under DR 1-102(A) (6).

COUNTS II, III, IV, V, AND VI

These counts, in the aggregate, are concerned with certain of respondent's business activities, both as a lawyer and in the business field, between approximately January 1977 and December 1980. Each count charges that respondent committed acts which violated his oath of office as an attorney, set out in § 7-104, and were in violation of DR 1-102, previously set out in detail.

The acts set out in counts II, III, IV, and V were done in connection with various business transactions between Marvin Copple, as seller, and respondent and Paul Galter, as buyers. In this connection the formal charges allege, in pertinent part, as follows:

COUNT II

1. That on or about January 12, 1977, the Respondent, Paul L. Douglas, and Paul Galter, an attorney at law . . . and a business associate of the Respondent, jointly signed a Purchase Agreement in which they contracted to purchase certain real estate from the said Marvin E. Copple for the sume [sic] of \$241,744.00.

2. That at all times mentioned herein, there was in existence, the Nebraska Political Accountability and Disclosure Act, being Sections 49-1401 to 49-14,138, Revised Statutes of Nebraska, 1943, Reissue of 1978, as amended effective August 30, 1981, 1982 Cumulative [sic] Supplement; that pursuant to the terms, provisions and requirements of said Nebraska Political Accountability and Disclosure Act, the said Paul L. Douglas,

Respondent, did file on February 27, 1978, with the Nebraska Accountability and Disclosure Commission, a statement of financial interest as required by said Act for the calendar year 1977.

3. That Section 49-1496 of said Act required the Respondent to disclose the name, address and nature of business of each creditor . . . to whom the Respondent may have owed or guaranteed the sum of \$1,000 or more.

4. That in said statement filed by the said Paul L. Douglas, Respondent, on February 27, 1978, he failed to report or to disclose that he had contracted to purchase certain real estate from Marvin E. Copple for the sum of \$241,744.00, and that he was so indebted to Marvin E. Copple, and that Marvin E. Copple was a creditor of the said Paul L. Douglas, Respondent, in the amount of \$241,744.00; that the failure of the said Paul L. Douglas, Respondent, to so report and disclose the said indebtedness [sic].

5. That the actions of the Respondent, as set forth above, constitute a violation of his Oath of Office as an attorney licensed to practice law in the State of Nebraska, as provided by Section 7-104 R.R.S. 1977, and are in violation of the following provisions of the Code of Professional Responsibility, to-wit: [DR 1-102, as set out above].

COUNT III

1. That on or about September 8, 1977, the Respondent, Paul L. Douglas, and Paul Galter . . . jointly signed a Purchase Agreement in which they contracted to purchase certain real estate from the said Marvin E. Copple for the sum of

\$320,755.00.

2. Paragraph 2 of Count II is made a part hereof by reference, as if fully set out herein.

3. Paragraph 3 of Count II is made a part hereof by reference, as if fully set out herein.

4. That in said statement filed by the said Paul L. Douglas, Respondent, on February 27, 1978, he failed to report or to disclose that he had contracted to purchase certain real estate from Marvin E. Copple for the sum of \$320,755.00, and that he was so indebted to Marvin E. Copple, and that Marvin E. Copple was a creditor of the said Paul L. Douglas, Respondent, in the amount of \$320,755.00; that the failure of the said Paul L. Douglas, Respondent, to so report and disclose the said indebtedness [sic].

5. [Same as paragraph 5 in count II.]

COUNT IV

1. That on or about June 1, 1979, the Respondent, Paul L. Douglas, and Paul Galter . . . jointly signed a Purchase Agreement in which they contracted to purchase certain real estate from the said Marvin E. Copple for the sum of \$105,600.00.

2. Paragraph 2 of Count II is made a part hereof by reference, as if fully set out herein.

3. Paragraph 3 of Count II is made a part hereof by reference, as if fully set out herein.

4. That in said statement filed by the said Paul L. Douglas, Respondent, on March 27, 1980, he failed to report or to disclose that he had contracted to purchase certain real estate from Marvin E. Copple for the sum of \$105,600.00, and that he was so indebted to Marvin E. Copple, and that Marvin E.

Copple. was a creditor of the said Paul L. Douglas, Respondent, in the amount of \$105,600.00; that the failure of the said Paul L. Douglas, Respondent, to so report and disclose the said indebtedness [sic].

5.[Same as paragraph 5 of count II.]

COUNT V

1. That on or about April 20, 1977, the Respondent, Paul L. Douglas, borrowed from the Commonwealth Savings Company of Lincoln, the sum of \$241,744.00; that said loan was thereafter extended and renewed until on or about August 30, 1979, when said loan was paid in full by the Respondent, Paul L. Douglas; that the said loan and the extensions and the renewals thereof were not made in the ordinary course of business.

2. Paragraph 2 of Count II is made a part hereof by reference, as if fully set out herein.

3. Paragraph 3 of Count II is made a part hereof by reference, as if fully set out herein.

4. That the Respondent, Paul L. Douglas, failed to report or to disclose the above-mentioned loan of April 20, 1977, and its subsequent renewals in the statements filed for the years 1977, 1978 and 1979.

5.[Same as paragraph 5 of count II.]

Count VI concerns certain legal services rendered by respondent to Marvin Copple and alleges, in pertinent part, as follows:

COUNT VI

1. That in the years 1978, 1979 and 1980, the

Respondent, Paul L. Douglas, performed legal services for Marvin E. Copple in connection with the Timber Ridge Real Estate Development, and that in consideration of the above services, the said Marvin E. Copple paid to the Respondent, Paul L. Douglas, by his personal check the following:

\$ 5,000.00 on or about December 19, 1978

\$ 5,000.00 on or about April 13, 1979

\$ 7,500.00 on or about September 5, 1979

\$15,000.00 on or about December 24, 1980

\$ 5,000.00 in the year 1980

(exact date not given)

TOTAL - \$37,500.00

2. Paragraph 2 of Count II is made a part hereof by reference, as if fully set out herein.

3. Paragraph 3 of Count II is made a part hereof by reference, as if fully set out herein.

4. That in the statement filed by the said Paul L. Douglas, Respondent, for the calendar years 1978, 1979 and 1980, he failed to report or to disclose therein that he had received income of more than \$1,000.00 in each of said years from the said Marvin E. Copple or from the Timber Ridge Real Estate Development, as herein alleged.

5. [Same as paragraph 5 in count II.]

A summary of these five charges is well set out at pages 51 and 52 of the referee's report, as follows:

Counts II through VI: Accountability and Disclosure Omissions

Counts II and III charge that the Respondent on his 1977 Statement of Financial Interests filed with the Nebraska Accountability and Disclosure Commission pursuant to Neb. Rev. Stat. §49-1493 (Cum. Supp. 1976) failed to identify Marvin Copple as a creditor to whom \$1,000 or more was owed, despite the alleged debt arising, respectively, from the January 12, 1977 lot purchase agreement for \$241,744 and from the September 8, 1977 lot purchase agreement for \$320,755. Count IV charges Douglas omitted from his 1979 Statement of Financial Interests the name of Marvin Copple as a creditor with respect to the June 1, 1979 lot purchase agreement for \$105,600. Count V charges the Respondent omitted from his Statements of Financial Interests for 1977, 1978 and 1979 the name of Commonwealth as a creditor, although during each of those years he owed Commonwealth \$241,744 plus interest upon a loan extended April 20, 1977 and periodically renewed until repayment on August 30, 1979. Count VI charges that the Respondent on his 1978, 1979 and 1980 Statements of Financial Interests failed to disclose as additional income of \$1,000 or more payments totalling \$37,500 from Marvin Copple "in connection with the Timber Ridge Real Estate Development for 'legal services'".

As set out above, in each count the formal charge alleged the applicability of the Nebraska Political Accountability and Disclosure Act, §§ 49-1401 et seq. Section 49-1496 (Reissue 1978) of that act provided, in pertinent part, at the times in question, as follows:

49-1496. Statement of financial interests; form; contents; enumerated. (1) The statement of financial interests filed pursuant to sections 49-1493 to 49-14,104 shall be on a form prescribed by the commission.

(2) Individuals required to file under sections 49-1493 to 49-1495 shall file the following information for themselves:

(a) The name and address of and the nature of association . . . ;

(b) The name, address, and nature of business of a person from whom any income or gift in the value of one thousand dollars or more was received during the preceding year and the nature of the services rendered. If income results from employment by, operation of or participation in a proprietorship or partnership or professional corporation or business or nonprofit corporation or other person, the person may list the proprietorship or partnership or professional corporation or business or nonprofit corporation or other person as the source and not the patrons, customers, patients or clients of the proprietorship or partnership or professional corporation or business or nonprofit corporation or other person;

(c) The description, including nature and location of all real property except the residence of the individual, in the state, the fair market value of which exceeds one thousand dollars . . . ;

(d) The name and address of each creditor to whom the value of one thousand dollars or more was owed by the filer or a member of the filer's

immediate family. Accounts payable, debts arising out of retail installment transactions or from loans made by financial institutions in the ordinary course of business, loans from a relative, and land contracts that have been properly recorded with the county clerk or the register of deeds need not be included;

. . . .
(f) Such other information as the person required to file the statement or the commission deems necessary, after notice and hearing, to carry out the purposes of sections 49-1401 to 49-14,138.

The individuals required to file statements under § 49-1496 specifically include the Attorney General of Nebraska, as set out in § 49-1493(1) and (Reissue 1978).

In his brief at 21, respondent concedes "that if the Respondent's conduct in filing his reports with the Nebraska Political Accountability and Disclosure Commission constituted dishonesty, fraud, deceit, or misrepresentations, it might constitute grounds for discipline in the present proceedings irrespective of the statute's constitutionality." Respondent goes on to state: "However, in view of the unconstitutionality of the statute, that conduct must be evaluated on its own and such evaluation may not attribute any weight or degree of seriousness to the alleged violation of an unconstitutional statute."

Respondent attacks the constitutionality of the statute on the grounds that § 49-14,105 (Reissue 1984) provides that the Governor of the State appoints four

members of the nine-member commission (and two of those appointments must be made from two lists submitted by the Legislature), while the Secretary of State appoints the other four appointed members (and two of those are from lists submitted by the Republican and Democratic state chairpersons). Respondent contends that the Legislature may not constitutionally encroach upon the executive branch, citing *State ex rel. Beck v. Young*, 154 Neb. 588, 48 N.W.2d 677 (1951), and *Wittler v. Baumgartner*, 180 Neb. 446, 144 N.W.2d 62 (1966).

This part of respondent's attack on the constitutionality of §§ 49-1401 et seq. was answered by a brief filed by the current Nebraska Attorney General. The Attorney General contends that the constitutionality of the act is irrelevant to a disciplinary proceeding and that the respondent has no standing to challenge it. We agree.

Respondent does not set out the basis of his standing to challenge the act. The matter before us is not confined to the question as to whether respondent has violated the act, but the matter of respondent's conduct.

We have previously addressed the issue of how the validity of a statute affects disciplinary proceedings against an attorney. In *State ex rel. Nebraska State Bar Assn. v. Leonard*, 212 Neb. 379, 322 N.W.2d 794 (1982), the court considered the discipline of an attorney who had entered a plea of nolo contendere to violation of a federal statute. It was noted by the referee that the statute in question was not actually in effect during the period of time charged in the attorney's indictment. Thus, as applied to the disciplined attorney, it could

have been argued that the statute was an ex post facto law. The court stated at 383, 322 N.W.2d at 796:

The fact that the federal statute, which the respondent was charged with having violated, was an ex post facto law is not controlling in this proceeding for several reasons. It is the respondent's conduct or "actions" which is [sic] in issue rather than whether he was technically guilty of the crime charged. An attorney may be subjected to disciplinary action for conduct outside the practice of law for which no criminal prosecution has been instituted or conviction had. *State ex rel. Nebraska State Bar Assn. v. Bremers*, 200 Neb. 481, 264 N.W.2d 194 (1978).

The issue of the constitutionality or unconstitutionality of the Nebraska Political Accountability and Disclosure Act is irrelevant to the issues before us.

In *Dennis v. United States*, 384 U.S. 855, 86 S. Ct. 1840, 16 L. Ed. 2d 973 (1966), the petitioners were charged with conspiring to defraud the government. Specifically, it was alleged that the petitioners filed false statements or affidavits in order to secure the services of the National Labor Relations Board. The petitioners contended that their convictions could not stand because the statute requiring the filing of the statements or affidavits was unconstitutional as a bill of attainder. To this, the Court in *Dennis* replied at 384 U.S. at 865:

We need not reach this question, for the petitioners are in no position to attack the constitutionality of § 9(h). They were indicted for an alleged conspiracy,

cynical and fraudulent, to circumvent the statute. Whatever might be the result where the constitutionality of a statute is challenged by those who of necessity violate its provisions and seek relief in the courts is not relevant here. This is not such a case. The indictment here alleges an effort to circumvent the law and not to challenge it—a purported compliance with the statute designed to avoid the courts, not to invoke their jurisdiction.

Quoting *Kay v. United States*, 303 U.S. 1, 58 S. Ct. 468, 82 L. Ed. 607 (1938), the *Dennis* Court stated at 384 U.S. at 866:

“When one undertakes to cheat the Government or to mislead its officers, or those acting under its authority, by false statements, he has no standing to assert that the operations of the Government in which the effort to cheat or mislead is made are without constitutional sanction.”

In *Dennis*, the prosecution was for the petitioners’ fraud. It was not an action to enforce the statute claimed to be unconstitutional. The same is true with the case at bar. It is a case directed at the respondent’s actions, not a case to enforce the statute claimed to be unconstitutional.

“[O]ne who furnishes false information to the Government in feigned compliance with a statutory requirement cannot defend against prosecution for his fraud by challenging the validity of the requirement itself.” *United States v. Knox*, 396 U.S. 77, 79, 90 S. Ct. 363, 24 L. Ed. 2d 275 (1969).

In the proceeding before us, relator is not trying in any way to charge respondent with any violation of the act, but has merely alleged that certain conduct of respondent has not measured up to the standard that our statutes have set for certain purposes. Respondent, of course, is in a particular situation where he, as the Attorney General of Nebraska, chose to comply with the act by making filings under the act. We hold that respondent has no standing to challenge the act's constitutionality in this proceeding and that we are judging his *conduct* in furnishing information to the public, as required by the act. If respondent has chosen to mislead the public by his filings under the act, we are not concerned with any violation of the act, but with his conduct in improperly informing, or in misleading, the public. In summary, this court, like the U.S. Supreme Court in the *Dennis* case, does not reach the question as to the constitutionality of §§ 49-1401 et seq., but we consider respondent's conduct under the Act.

Section 49-1495 requires that the Attorney General shall "file with the commission a statement of financial interests as provided in sections 49-1496 and 49-1497" Section 49-1496(2)(d) (Reissue 1978) provides:

The name and address of each creditor to whom the value of one thousand dollars or more was owed by the filer or a member of the filer's immediate family. Accounts payable, debts arising out of retail installment transactions or from loans made by financial institutions in the ordinary course of business, loans from a relative, and land contracts that have been properly recorded with the county clerk or the register of deeds need not be included.

The evidence shows that respondent and Paul Galter entered into three purchase agreements with Marvin Copple: (1) on January 12, 1977, in the amount of \$241,744 (count II); (2) on September 8, 1977, in the amount of \$320,755 (count III); and (3) on June 1, 1979, in the amount of \$105,600 (count IV). The referee, at page 56 of his report, determined:

On their face, the purchase agreements appear to create a contractual obligation for the Respondent and Paul Galter to pay Marvin Copple the full purchase price upon the sale of the lots, issuance of building permits or expiration of one year from the dates of the agreements. But the actual agreement between the parties to the contract was that no payment was necessary, including the down payment which the contracts recited had been paid but actually had not been, until Marvin Copple would sell a lot and the new purchaser would pay the money. At that point, according to the oral agreement between the parties and their course of conduct, Copple would deed the lot to the Respondent, the Respondent would sign a deed (prepared by Copple) to the new purchaser, the new purchaser would pay the Respondent, the Respondent would pay Copple the originally agreed-upon purchase price, and the Respondent and Paul Galter would split the profit from the sale. At least this was the procedure that was followed for the 40 lots covered by the September 8, 1977 agreement and the 12 lots under the June 1, 1979 agreement. These 52 lots all were sold to Judith Driscoll in two transactions. The original group of 26 lots were handled

differently in that Marvin Copple arranged for Commonwealth to loan to the Respondent the agreed-upon purchase price for the 26 lots in exchange for a note made by the Respondent and guaranteed by Paul Galter and a mortgage. For these lots, Copple received full payment at the time of the loan and the Respondent repaid principal and interest to Commonwealth as Copple sold the lots to third parties, including eight lots sold to Driscoll. Thus, for the 26 lots, there was a real obligation and debt to Commonwealth. But for the 26 lots before the Commonwealth loan and the later groups of 40 lots and 12 lots, no current or binding obligation existed. Although the Commonwealth loan and the sales to Driscoll intervened before the one-year pay back provisions of the lot purchase agreements might have come into effect, there is no evidence to contradict the testimony of the parties to those agreements that the Respondent and Paul Galter would not have been obligated to pay had the lots not sold and that the parties could have changed the agreements to designate different lots, had they so chosen.

Thus, the agreement between the parties as it actually existed is consistent with the Respondent's position that no reportable debt to Marvin Copple existed with respect to the lots. I do not read the Act to require identification of a seller of property when the obligation to pay for it arises simultaneously with the transfer of title.

Turning first to the allegations of count II, the record shows the following. On January 12, 1977,

respondent and Paul Galter signed a purchase agreement agreeing to purchase, from Marvin Copple, 26 described lots in a subdivision in Lancaster County, Nebraska. In the purchase agreement, the parties agreed that "[t]he total purchase price shall be the sum of \$241,774.00 which the parties agree has been computed on the basis of *one hundred* Dollars (\$100.00) per frontal foot for the real estate described above." In this provision, and in later provisions discussed, the underlined words were written, while the balance was preprinted.

The agreement acknowledges the seller's receipt of "*One hundred* Dollars (\$100.00) per lot at the time of the execution of this agreement" This receipted amount was not paid by buyers at the time the agreement was signed. The agreement further provided that the balance, plus interest at 8 $\frac{3}{4}$ percent per annum beginning 120 days after the agreement was executed, was due when the lots were sold, or when a building permit was obtained for a lot, "provided, however, that the full purchase price for each lot, plus interest . . . shall be paid not later than *Jan. 12, 1978.*"

The agreement further provided that Marvin Copple had "the right to sell, assign, pledge, encumber or hypothecate this Purchase Agreement." Marvin Copple did assign this agreement to the Commonwealth Savings Company on April 20, 1977. Respondent signed a mortgage and note to Commonwealth and on that date Commonwealth issued a check in the amount of \$241,744 to respondent, Marvin E. Copple, and Paul Galter. Respondent and Galter endorsed and gave the Commonwealth check to Marvin Copple.

In exchange, respondent testified, Marvin Copple gave respondent a deed to the 26 lots, and respondent gave the deeds to Commonwealth. These deeds are not in evidence as such, and the only information concerning the deeds exists in other documents—respondent's 1977 income tax return (exhibit 19) and exhibit 58, a partial abstract as to the lots described in the three purchase agreements between Copple, respondent, and Galter. The 1977 tax return shows a sale of an undivided interest in 10 lots acquired on April 20, 1977, and an installment sale of 14 lots also acquired April 20. In each of those installment sales, one payment of \$50 is indicated, resulting in a "reportable gain" of approximately \$6 per lot. Exhibit 58 also shows that respondent received deeds to 12 lots from Copple and his wife on April 20, 1977, five separate deeds to five different lots later in 1977, and deeds to six other lots in 1978; three lots are unaccounted for. Respondent's 1979 income tax return showed a gain resulting from the sale of 10 lots that were acquired on April 20, 1977. The foregoing shows the confusion generated by the sloppy records of respondent, and results in this court, or any investigator of this whole situation, being unable to determine what actually occurred.

The specific allegations of counts II, III, and IV allege that respondent did not report an indebtedness to Marvin Copple in his statement of financial interests (hereinafter "disclosure report") forms filed with the State. For the years 1977 and 1978, the reports filed by respondent stated "None" in answer to the question in item 11 on the forms, "Name and Address of Each Creditor to whom the Value of \$1,000 or More was

Owed by You” For the year 1979, respondent’s report states “None” in answer to the question in item 10, “Creditors to whom \$1,000 or More was Owed by You” The referee determined that respondent’s answers were not so incorrect as to be a violation of the disclosure act and that relator had failed to prove the charges against respondent in counts II, III, and IV.

The referee thus determined that respondent was entitled to state in his disclosure report that he was indebted to no one in excess of \$1,000 in 1977, because the disclosure act does not require that a filer report the debt rising from a purchase if the “obligation to pay for it arises simultaneously with the transfer of title.” We cannot agree with that conclusion. The facts are undisputed. Respondent signed three purchase agreements, totaling \$668,129. In return, Marvin Copple agreed to convey to respondent (and Paul Galter) specific real property. Respondent contends the transaction was only a way to compensate him for services rendered to Marvin Copple and did not create a debt from respondent to Copple.

Respondent’s position flies in the face of the way he himself has treated the transaction, and in the face of the realities of the situation. To maintain his position, respondent must contend that the contract between him and Copple means nothing and that their unexpressed intention controls the language and effective meaning of the agreement. That is not the law in this state where third parties, other than the two contracting parties, are induced to rely on such written agreements. Others relied on the written contracts between respondent and Copple. In the case of the first 26-lot

purchase agreement, Commonwealth, as assignee of the agreement, relied on the validity of the written agreement. In the other two purchase agreements, the U.S. Government and the State of Nebraska, as taxing authorities, relied on the agreements, and Nebraska is concerned, as a government entity relies on truthful information furnished to it as to the activities of its officials.

We have consistently held that an unambiguous contract is not subject to interpretation or construction and that courts are not free to rewrite a contract for parties or speculate as to terms which the parties have not seen fit to set out. *T.V. Transmission v. City of Lincoln*, 220 Neb. 887, 374 N.W.2d 49 (1985). We have stated that "a written contract expressed in unambiguous language is not subject to interpretation or construction, and the parties' intention must be determined from its contents alone." *Gilbreath v. Ridgeway*, 218 Neb. 822, 826, 360 N.W.2d 474, 477 (1984). In this case, the contract between respondent and Copple is not ambiguous in any way. It was, in fact, written on a form used in the ordinary course of Copple's business to transfer lots. If respondent wanted to express another contractual arrangement, he was free to do so. Respondent was an experienced lawyer. It is difficult to find that respondent signed an assignable agreement that required him to pay substantial sums of money within 1 year unless he was willing to be bound by such promises.

The actual interpretation respondent placed on the agreements shows the same result. Respondent admits the agreements constituted the transfer of an interest

in land by Copple to respondent by the fact respondent states in his disclosure reports that he has an interest in the land. At that point the land is a gift to him, or he owes someone for it. Respondent does not contend he paid for the land at the time the agreement was signed, nor does he contend it was a gift.

In his federal income tax returns for 1977 and 1979, respondent indicated a capital gains sale, with an acquisition date of the contract date. To adopt the referee's reasoning would mean that respondent could not use the contract date as a purchase date, but rather the date that Copple arranged for a sale from respondent to others. Respondent's obligation to Copple did not arise when respondent sold the property, but arose under the written agreement with Copple.

This holding that both respondent and Copple had rights and duties under the contract is clearly exemplified in the 26-lot transaction of January 12 and April 20, 1977. The agreement was actually assigned to a third party. There were no further provisions in the two later agreements that the same thing could not be done again. The possibility of third-party participation in the assignable contracts could not be ruled out by the respondent's oral assertions that he would not permit such assignment.

As set out in count II, respondent was indebted to Copple in 1977 in amounts greater than \$1,000. He did not report such debts on his disclosure forms. We find that respondent is guilty of the charges set out against him in count II.

The same reasoning applies to the allegations in counts III and IV. We find respondent guilty of the charges set out against him in counts III and IV.

A different factual situation is set out in count V. It is undisputed that respondent did not list Commonwealth Savings Company as a creditor in his disclosure forms for the years 1977, 1978, or 1979; that he owed Commonwealth money in each of those years; and that there was a Commonwealth loan in 1977, as set out above in connection with the 26-lot purchase agreement in 1977.

Respondent did not report any Commonwealth loans on his disclosure reports. His reason was that in the instructions issued with the 1977 form, there was a proviso that loans of the following types need not be reported: "(b) . . . Accounts payable, debts arising out of retail installment transactions or from loans made by financial institutions in the ordinary course of business, loans from a relative, and land contracts that have been recorded with the County Clerk or the Register of Deeds." A similar provision was in the 1979 instructions. These instructions reflected generally the provisions of § 49-1496(2) (d). Respondent contends any loans made by Commonwealth to him were made "by financial institutions in the ordinary course of business." The referee agreed with respondent's position and held that since the loans were made in the ordinary course of Commonwealth's business, respondent had no obligation to disclose them. Since we are judging respondent's conduct, the definition of "ordinary course of business" could refer to the lender's business, and we cannot say the respondent did not comply with the

requirements of the disclosure act in this respect. We determine that respondent is not guilty of the charges against him in count V.

A still different problem exists with regard to count VI. In that count, respondent is charged with failing to report income received from Marvin Copple in 1978, 1979, and 1980. Again, the facts are not in dispute. Copple, by five personal checks, paid respondent the total sum of \$37,500 in those years. On his disclosure forms for those years, respondent did not report any income from Copple in any of those years. In the 1978 report, item 8 requested the following information: "Name, Address and Nature of Business of a Person from whom Any Income or Gift in the Value of \$1,000 or More was Received During the Period of This Report and the Nature of the Services Rendered or Circumstances of Gift," and "Nature of Services Rendered" Respondent answered this question, in part, "Foxhollow Development, 1200 Manchester Dr., Lincoln, NE 68528"; "Real Estate"; and described the services rendered as "Land Development."

In the 1979 and 1980 reports, item 6, entitled "Places of Employment & Business Associations," requested the following information: "Names and Addresses of Places of Employment and Businesses"; "Nature of Association (Specify: employee, owner, partner, director, officer, trustee See Instructions Item 6)"; and "If you received more than \$1,000 from such sources, include nature of payor's business and services you rendered."

In the 1979 report, respondent furnished this requested information, in part, by setting out the name and address of places of employment as "Foxhollow Development, 1200 Manchester Dr., Lincoln, NE 68528"; in describing the nature of the association, replied, "Owner of certain lots"; and set out the nature of the payor's business as "Land development. Made judgement decisions and financial investments."

In the 1980 report, the same questions were answered: "Foxhollow Development, 1200 Manchester Dr., Lincoln, NE 68528"; the nature of association as "Real Estate Development"; and the nature of the payor's business in the same way as in 1979.

The instructions for answering item 8 in the 1978 report included: "(b) 'Person' means a business, individual, proprietorship, firm, partnership, joint venture, syndicate, business trust, labor organization, company, corporation, association, committee or any other organization or group of persons acting jointly."

The instructions as to how to respond to item 6 in the 1979 and the 1980 reports included:

Business includes a government, political subdivision, body corporate and partnership, sole proprietorship, firm, enterprise, franchise, association, organization, self-employed individual, holding company, joint stock company, receivership, trust, activity or entity.

OWNER-applies to situations where the filer is the sole proprietor of a business. Under the column entitled "Names and Addresses of Places of Employment and

Businesses," the filer's name, trade name or name in which he did business should be used.

The referee describes the charges in count VI as follows:

Like the other charges, Count VI alleges that the actions set out in the charge constitute a violation of the Respondent's oath of office as an attorney and violate DR1-102 of the Code of Professional Responsibility. That provision of the Code deals with violations of disciplinary rules, illegal conduct involving moral turpitude, dishonesty, fraud, deceit, misrepresentation, and any other conduct adversely reflecting on fitness to practice law. I fail to see how any of these characterizations could properly be placed on the Respondent's disclosure of his business associations and sources of income during 1978 through 1980. All but \$7,500 of the \$37,500 referred to in Count VI related to the Respondent's services in connection with the Fox Hollow development of Marvin Copple. Instead of listing the name of the developer, the Respondent listed the name of the development and the address which Marvin Copple used for his real estate development activities. I can see nothing dishonest, deceitful, or otherwise malevolent about listing the development rather than the developer.

Only one of the checks from Copple related to his services on the Timber Ridge development rather than the Fox Hollow development. To be consistent, the Respondent should have listed on his 1979 Statement of Financial Interests the name

of Timber Ridge Development or Marvin Copple's name as the developer to whom he rendered services. The Fox Hollow listing in 1979 is accurate because \$5,000 was received during that year for services related to Fox Hollow. The question is whether the omission of the name of Timber Ridge or of Marvin Copple constitutes a violation of the Code. While the omission, strictly speaking, is inaccurate, I believe the purpose of the Act was fulfilled by disclosing involvement with another real estate development of Marvin Copple, listing Copple's business address, and disclosing in a general way his involvement in land development. I conclude that the omission of Timber Ridge or Marvin Copple from the 1979 statement cannot be characterized by reference to any of the language of DR 1-102.

Insofar as it is contended that respondent's conduct in the reporting of his financial activities in his filed disclosure forms cannot be considered as a violation of his oath of office as an attorney or the provisions of DR 1-102, we find that if such conduct constitutes "dishonesty, fraud, deceit, or misrepresentation" or "other conduct that adversely reflects on his fitness to practice law," it is sufficient to violate DR 1-102; or if such conduct results in a failure to "faithfully discharge the duties of an attorney and counselor," it is sufficient to violate respondent's oath as an attorney, as set out in § 7-104.

The referee found that respondent's "disclosure of his business associations and sources of income during

1978 through 1980" did not violate any of respondent's duties as set out above. We cannot agree.

Respondent's disclosure form for 1978 showed he received income greater than \$1,000 from a "person" described as "Foxhollow Development." The statutory requirement is set out in § 49-1496(2)(b), and requires the filing of information as follows: "The name, address, and nature of business of a person from whom any income or gift in the value of one thousand dollars or more was received during the preceding year and the nature of the services rendered."

"Person" is defined in § 49-1438 as: "Person shall mean a business, individual, proprietorship, firm, partnership, joint venture, syndicate, business trust, labor organization, company, corporation, association, committee, or any other organization or group of persons acting jointly." "Foxhollow Development" is not shown in the record before us as any of those. The clear, undisputed fact is that respondent received one check in the amount of \$5,000 from Marvin Copple in 1978; received two checks in the total amount of \$12,500 from Copple in 1979; and received two checks in the total amount of \$20,000 from Copple in 1980. None of respondent's disclosure forms mention Marvin Copple.

The legislative findings and intent in enacting the Nebraska Political Accountability and Disclosure Act, §§ 49-1401 et seq., are set out, in pertinent part, in § 49-1402 (Reissue 1978), as follows:

(3) That it is essential to the proper operation of democratic government that public officials and

employees be independent and impartial, that governmental decisions and policy be made in the proper channels of governmental structure, and that public office or employment not be used for private gain other than the compensation provided by law; and

(4) That the attainment of one or more of these ends is impaired when there exists, or appears to exist, a substantial conflict between the private interests of a public official and his duties as such official; and that although the vast majority of public officials and employees are dedicated and serve with high integrity, the public interest requires that the law provide greater accountability, disclosure, and guidance with respect to the conduct of public officials and employees.

Section 49-1496 requires that the filer under the act set out the name of the person from whom more than \$1,000 was received. If a public official receives such sums, that official has the obligation to publicly set out, in an appropriate disclosure form, the name of the person from whom the public official has received the money and, therefore, to whom the public official might be beholden. Respondent chose not to do so, but instead to say he has received money from "Foxhollow Development," an entity as to which he described, in his 1979 disclosure report, the nature of his association as "[o]wner of certain lots." In 1979, the instructions in connection with the disclosure form stated: "Item 6: Business Associations-Nature of Association: *OWNER*-applies to situations where the filer is the sole proprietor of a business. Under the column entitled

'Names and Addresses of Places of Employment and Businesses,' the filer's name, trade name or name in which he did business should be used."

We find that respondent has failed to report income from Marvin Copple as he was required to do by § 49-1496(2) (b). Instead, respondent created the impression that he was engaged in a business from which he received income, and in 1979 described himself as an "owner"—that is, giving the impression that he was the proprietor of Fox Hollow Developments. Respondent did not disclose he was an employee of Marvin Copple. Respondent explained his failure to list Marvin Copple as a person from whom he received income, in the hearing before the Committee on Inquiry of the Second Disciplinary District, as follows:

A I suppose — From the questioning I'm getting, I suppose I should have listed M. E. Copple or Marvin Copple, 1200 Manchester Drive, Lincoln, Nebraska, real estate, and that would have solved all the problems.

I started out — I wrote down Fox Hollow development at that address and I just stayed there. I didn't — It wasn't as a matter to conceal or hide anything. I suppose I just — I listed Fox Hollow development and just stayed with Fox Hollow development.

To this day, I don't find it that significant.

It wasn't a matter of trying to conceal or hide anything.

In our review, we determine that respondent's misrepresentation was significant and that respondent so conducted himself as to not truthfully answer the questions in the disclosure forms in order not to disclose his relationship to Marvin Copple. We find respondent guilty of the charges set out against him in count VI.

COUNTS VII, VIII, AND IX

These counts, which will be considered together, relate to false statements by the respondent to Richard Kopf, the special counsel to the Special Commonwealth Committee of the Legislature, concerning payments the respondent received from Marvin Copple and whether the respondent had paid income tax on the payments. The formal charges allege in pertinent part as follows:

COUNT VII

. . . .

6. That in a letter to Richard G. Kopf dated February 6, 1984, the Respondent stated that he had been paid a total of \$32,500.00 from Marvin E. Copple during the years 1978, 1979 and 1980. That at the time the Respondent made the above-mentioned assertions he knew the same to be false.

7. That the actions of the Respondent, as set forth above, constitute a violation of his Oath of Office as an attorney licensed to practice law in the State of Nebraska, as provided by Section 7-104 R.R.S. 1977, and are in violation of the following provisions of the Code of Professional Responsibility, [previously set out].

COUNT VIII

.....

5. That on February 25, 1984, the Respondent testified under Oath before the Special Commonwealth Committee of the Legislature of Nebraska.

6. That during his above-mentioned testimony the Respondent stated that he had received payments totaling \$32,500.00 from Marvin E. Copple. That at the time the Respondent made said statements he knew the same to be false.

7. That the actions of the Respondent, as set forth above, constitute a violation of his Oath of Office as an attorney licensed to practice law in the State of Nebraska, as provided by Section 7-104 R.R.S. 1977, and are in violation of the following provisions of the Code of Professional Responsibility, [previously set out].

COUNT IX

.....

5. That on February 25, 1984, the Respondent testified under Oath before the Special Commonwealth Committee of the Legislature of Nebraska.

6. That during his above-mentioned testimony the Respondent stated that he had paid income tax on all of the payments he received from Marvin E. Copple. That at the time the Respondent made said statements he knew the same to be false.

7. That the actions of the Respondent, as set forth above, constitute a violation of his Oath of Office as an attorney licensed to practice law in the State of Nebraska, as provided by Section 7-104 R.R.S. 1977, and are in violation of the following

provisions of the Code of Professional Responsibility, [previously set out].

Count VII charges that in a letter to the special counsel of the special Commonwealth Committee of the Legislature, respondent stated that he had been paid a total of \$32,500 by Copple during 1978, 1979, and 1980, and that he knew the statement was false. Count VIII charges that in testimony before the legislative committee he said he received payments totaling \$32,500 from Copple, knowing the statement to be false. Count IX charges that in testimony before the legislative committee respondent said he had paid income tax on all of the payments he received from Copple, knowing the statement to be false. Briefly, it is charged that the false statements violate his oath of office as an attorney and DR 1-102(1)(4), in that they amount to fraud, deceit, misrepresentation, and conduct adversely reflecting on respondent's fitness to practice law.

In his 1980 federal income tax return, respondent showed income of \$15,000 as a management fee, but another \$5,000 payment from Copple, in the form of one check, was not shown. Respondent testified that in drafting the letter to the special counsel and in preparation for testimony before the legislative committee he relied upon his income tax returns; that the omission of \$5,000 from the 1980 return was inadvertent, the result of poor recordkeeping; and that later he learned of the omission from a newspaper article published following the 1984 perjury indictment, listing the payments he had received from Copple. He then looked through his bank records and found a \$5,000 deposit corresponding to the payment, and filed an amended

return for 1980, declaring the additional \$5,000. The \$5,000 check was one of five received from Copple. The others were reported on his tax returns.

The referee properly determined that the counts could not be sustained unless the relator proved by a clear preponderance of the evidence that respondent knew his statements were false at the time he made them. It is reasonable that in writing the letter to the special counsel and preparing for his testimony, respondent would consult his tax returns as the most convenient source and the ultimate distillation of many records. Pointing to the absence of countervailing evidence, the referee accepted respondent's version.

The cause is for trial de novo in this court, but we recognize that the referee heard and saw the witnesses and his findings must necessarily be considered on matters that are in irreconcilable conflict. *State ex rel. Nebraska State Bar Assn. v. Jensen*, 171 Neb. 1, 105 N.W.2d 459 (1960).

Although the omission to declare as much as \$5,000 in a tax return is suspect on its face, there was a trail of business records that could easily be picked up by the Internal Revenue Service in the slightest investigation. This seems inconsistent with a studied concealment. We believe that it is unlikely that respondent hoped to frustrate the investigation or diminish his role by intentionally omitting mention of an additional \$5,000 payment.

Respondent treated lot sales as capital transactions, and not as compensation. By offsetting capital

gains from total lot sales against a capital loss carryover, he was able to save over \$8,000 in federal and state income taxes. The referee noted that a liberal reading of count IX might allow consideration of the tax issue. However, he observed that at the hearing the relator drew no connection between the tax treatment of lot sales and count IX, and the referee felt it would be unfair to read count IX as doing so. The relator's brief in this court made no such contention. We decline to interfere with the referee's conclusion.

We find that counts VII, VIII, and IX have not been established by clear and convincing evidence.

COUNT XI

This count relates to the respondent's alleged use of his office for the benefit of a private client, the questionable nature of transactions in which he was involved with Marvin Copple, the conflict of interest that developed as a result of his transactions with Marvin Copple while the respondent was the Attorney General of the State of Nebraska, his failure to disclose the nature and extent of these activities, and his failure while Attorney General to promptly withdraw from all matters relating to the Commonwealth Savings Company.

Count XI of the formal charges alleges in pertinent part as follows:

3. That from January, 1975 and at all times material hereto Respondent was the duly elected Attorney General of the State of Nebraska and

charged with the duties and responsibilities specified by Reissue Revised Statutes of 1943, Section 84-201 et seq.; that as Attorney General was head of the executive department of state government "known as the Department of Justice"; that as head of the Department of Justice Respondent had "general control and supervision of all actions and legal proceedings in which the State of Nebraska may be a party or may be interested" and had "charge and control of all the legal business of all departments and bureaus of the state, or of any office thereof, which requires the services of attorney or counsel in order to protect the interests of the state" (R.R.S. 1943, Section 84-202); that included in those departments and bureaus was the Department of Banking and Finance (R.R.S. 1943, Sections 8-101 et seq.)

4. That from and after 1953 and at all times material hereto Respondent was an attorney admitted to practice law in Nebraska; that accordingly Respondent was a part of the judicial system of this State and an officer of the Courts of this State and subject to the Rules of Discipline adopted by the Supreme Court of this State.

5. That among the Rules of Discipline [Code] adopted by the Supreme Court of this State is DR 1-102 which provides:

(A) A lawyer shall not:

(1) Violate a Disciplinary Rule.

(4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

(5) Engage in conduct that is prejudicial to the

administration of justice.

(6) Engage in any other conduct that adversely reflects on his fitness to practice law.

6. That DR 1-102 was in full force and effect at all times material hereto.

7. That during the years 1976 through 1983 inclusive Commonwealth Savings Company was an industrial loan and investment company organized under the laws of the State of Nebraska and subject to "general supervision and control" by the Department of Banking and Finance, State of Nebraska (R.R.S. 1943, Section 8-401, et seq.); that during some or all of these years Marvin Copple was a real estate developer in Lincoln, Nebraska and an officer or director of Commonwealth Savings Company and the son of S. E. Copple, who was president of such institution; and that during some or all of these years Judith Driscoll, a/k/a J. E. Driscoll, was Marvin Copple's personal secretary or employee.

8. That during the years 1976 through 1983 inclusive Respondent engaged in a course of conduct violative of DR 1-102 in that he:

A. Undertook to provide legal or consulting services to Marvin Copple in the development of proposed subdivisions to the City of Lincoln known as Fox Hollow, Fox Hollow First, Fox Hollow Second and Timber Ridge, which included using his personal contacts with government officials or other prominent persons developed through his years of public service to:

1. Expedite the condemnation of an easement across property adjacent to that known as Fox Hollow to provide sewer service to such property.

2. Secure approval of the City of Lincoln for the installation of utilities at Fox Hollow by Executive Order.

3. Negotiate with the Army Corps of Engineers in regard to problems involving surface flowage easement across portions of Fox Hollow.

4. Protect the interest of Fox Hollow from adverse consequences of condemnation proceedings for construction of a high voltage transmission line.

5. Contact a high ranking officer at SAC Headquarters to secure written confirmation of proposed modification in military aircraft to reduce their noise levels to impeach or challenge the so-called ANCLUC study, which impeded the rezoning and development of Timber Ridge.

B. Engaged in questionable real estate transfers and loan activities with Marvin Copple, Judith Driscoll and Commonwealth Savings Company for the ostensible purpose of obtaining compensation for such services thereby facilitating the flow of Commonwealth Savings Company funds to Marvin Copple in exchange for title to or a security interest in Fox Hollow lots and compromising his ability to perform the duties of his office in regard to providing legal assistance to the Department of Banking in the investigation and prosecution of persons, including his client Marvin Copple, who allegedly had engaged in illegal acts which had impaired or contributed to the impairment of the financial solvency of Commonwealth Savings Company.

C. Failed to provide a full and complete disclosure of the nature and extent of these activities to the Director of the Department of Banking and Finance and the Governor of Nebraska when circumstances developed in regard to the insolvency of Commonwealth Savings Company which made such a disclosure necessary to protect the administration of justice and to secure public confidence in the fairness and adequacy of law enforcement officials and procedures in the State of Nebraska and particularly the office of Attorney General.

D. Failed to promptly disqualify himself from handling the legal business of the Department of Banking and Finance of the State of Nebraska in regard to the Commonwealth Savings Company matter when he knew or should have known that his failure to so act would impair public confidence in the administration of justice in the State of Nebraska and would be prejudicial to the administration of justice.

E. Failed to make a full and fair disclosure of these matters when requested to do so by Special Assistant Attorney General David Domina in November and December of 1983.

Subsection 8A

Subsection 8A alleges that the conduct of respondent in providing legal and consulting services to Marvin Copple in certain real estate developments violated disciplinary rules, DR 1-102(A)(1), which conduct was prejudicial to the administration of justice, DR

1-102(A)(5). Particularly applicable is the following disciplinary rule: "DR 8-101 Action as a Public Official. (A) A lawyer who holds public office shall not: . . . (2) Use his public position to influence, or attempt to influence, a tribunal to act in favor of himself or of a client."

That rule is explained in EC 8-8: "A lawyer who is a public officer, whether full or part-time, should not engage in activities in which his personal or professional interests are or foreseeably may be in conflict with his official duties."

Although there is some evidence to support the allegations contained in subsections 8A(1), (2), (3), (4), and (5), we find that part of the charge was not proven by clear and convincing evidence.

As part of its case, relator adduced evidence concerning respondent and an Air Force officer. Exhibit 35 is a letter signed by Air Force Col. John R. McKone, commander of Offutt Air Force Base, Omaha, Nebraska, addressed to "The Honorable Paul Douglas, Attorney General, State of Nebraska," listing several questions about military flights into the Lincoln airport that had been posed to the Air Force by the "Honorable Paul Douglas." Respondent explained that the letter was a response to his telephone call to McKone, whom he had met at a reception. In the telephone call, respondent said, he had explained that he was privately employed and that land being developed by a private developer was affected by the noise of night flights of military planes into and over the airport; respondent asked questions about the flights, and the letter was McKone's response.

Although some of the details of the professional and business relationship between respondent and Marvin Copple raise questions concerning the propriety of respondent's acts, there is no clear and convincing proof that such acts, legal services, and relationships *at the time performed* were in conflict with either his duties as a lawyer under the Code or his duties as Attorney General, to the end that they were prejudicial to the administration of justice. We therefore find that the referee properly found that this part of the charge in subsection 8A had not been proven.

However, that is not to say that the evidence supporting the allegations in subsection 8A does not support the charges in subsection 8D, particularly since the respondent's status of confidentiality with his client Copple continued after the termination of the attorney-client relationship. See, DR 4-101(B), "A lawyer shall not knowingly: (1) reveal a confidence or secret of his client"; EC 4-6, "The obligation of a lawyer to preserve the confidences and secrets of his client continues after the termination of employment." See, also, Neb. Rev. Stat. § 7-105(4) (Reissue 1983).

Subsection 8B

Subsection 8B alleges conduct involving dishonesty, fraud, deceit or misrepresentation that was prejudicial to the administration of justice, and that such conduct was in conflict with respondent's duties as Attorney General in the full investigation of the Commonwealth matter.

The transactions between the respondent and Marvin Copple in which Commonwealth Savings Company was involved were characterized by deception and subterfuge. On their face, the purchase agreements, notes, mortgages, and other documents purported to be binding obligations which created indebtedness on the part of the respondent and his associate, Paul Galter. The respondent, however, contends that these were merely devices by which he would be compensated by sharing in the profit or gain when the property was eventually sold, and that the instruments did not really represent a present indebtedness. Yet the April 20, 1977, promissory note and mortgage in the amount of \$241,774 to Commonwealth was the device by which Copple obtained that amount from Commonwealth for his own benefit. The respondent signed the note and mortgage and endorsed the Commonwealth check to Copple, and when these transactions were reported for tax purposes, they were treated as capital transactions in which the gain or loss was claimed as a capital gain or loss.

By engaging in the various transactions that the respondent had with Copple, the respondent facilitated the flow of funds from Commonwealth to Copple through the use of documents which the respondent claims were not what they appeared and purported to be. Although the respondent himself may not have personally profited greatly from these transactions, they enabled Copple to extract large sums of money from Commonwealth when it in fact was in a precarious financial condition.

We find that the respondent, by these transactions, engaged in conduct involving deceit and misrepresentation, in violation of DR 1-102(4), for which he is subject to discipline.

Subsections 8C and D

Since the issues of disclosure alleged in subsection 8C and disqualification alleged in subsection 8D are closely related conflict-of-interest issues, they are considered together. Both relate to Canon 5 of the Code, "A Lawyer Should Exercise Independent Professional Judgment on Behalf of a Client." The alleged conflicts emerged during the investigation by the Department of Banking of insolvent industrial loan companies, including Commonwealth. Briefly, the conflicts directly involved respondent, with his 1976 to 1981 active attorney-client relationship with Marvin Copple, and their personal business associations; and, indirectly, the conflicts involved both Marvin Copple and Commonwealth as a result of Copple's history as a onetime Commonwealth officer and sometime borrower of large sums of money from Commonwealth under irregular circumstances, and the \$500,000 payments made to Marvin Copple in 1981.

In 1980 and 1981, Marvin Copple was promoting the purchase of the Stettinger property, which Commonwealth eventually bought and paid Copple a \$500,000 fee in two equal \$250,000 checks, on January 15 and April 2, 1981. When this information was given to respondent by Barry Lake in May 1983, Lake described it in terms of "theft." That description should

have put respondent on inquiry concerning a conflict. Reasonable inquiry by respondent would have shown that Copple had received the two payments, and would have shown other attendant circumstances. Respondent did nothing. In addition, he did not disclose to the interested State officials of his past personal, business, and lawyer-client relationships with Copple. Although the record does not show that respondent performed any legal services for Copple as to the Stettinger tract, he was performing legal services for Copple on other real estate promotions during this 1981 period.

Conflicts have long been the concern of lawyers. When the Nebraska Bar was integrated in 1937, Canon 6 of the Canons of Professional Ethics provided:

It is unprofessional to represent conflicting interests, except by express consent of all concerned given after a full disclosure of the facts. Within the meaning of this canon, a lawyer represents conflicting interests when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose.

The obligation to represent the client with undivided fidelity and not to divulge his secrets or confidences forbids also the subsequent acceptance of retainers or employment from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed.

The terms "conflict" and "conflict of interest" do not appear as such in a Code rule; rather, they are referred to in the Code as "differing interests," and defined to include every interest that will adversely affect either

the judgment or the loyalty of a lawyer to a client, whether it be a conflicting, inconsistent, diverse, or other interest.

During this 1976 to 1981 period there were these three general conflict situations presented to respondent, as a lawyer, for his consideration and resolution.

First: At the time when respondent became counsel for Copple in 1976, he had a possible conflict of interest, as described in DR 5-105(A):

A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve him in representing differing interests, except to the extent permitted under DR 5-105(C).

Under those circumstances, and considering applicable statutes and rules, respondent had no clear conflict by accepting employment. See *Adams v. Adams*, 156 Neb. 778, 58 N.W.2d 172 (1953).

Second, after respondent accepted multiple employment, which was the 1976 to the end of the 1981 active employment period, he had a continuing possible conflict of interest, due to the application of DR 5-105(B).

A lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client, or if it would be likely to involve

him in representing differing interests, except to the extent permitted under DR 5-105(C).

DR 5-105(C), which refers to consent, is not applicable to a public officer. *State ex rel. Nebraska State Bar Assn. v. Richards*, 165 Neb. 80, 84 N.W.2d 136 (1957).

There was a close fact question whether the conflicts from multiple employment (State of Nebraska duties versus Marvin Copple confidences) during this 1976 to 1981 period prevented respondent from exercising independent judgment. We conclude that we cannot say that such a conflict was clearly shown from the evidence.

Third, in 1983, after termination of the multiple employment in 1981, a conflict of interest did arise when the respondent learned that Marvin Copple was suspected of the theft of money from Commonwealth. The exercise of independent professional judgment by the respondent on behalf of the State was adversely affected by his past lawyer-client relationship with Copple. EC 5-1 provides in part: "The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties." See, also, § 7-105(4). To the same effect as previously noted, DR 4-101(B) (1) and EC 4-6 provide that the obligation of a lawyer to preserve the confidences and secrets of his client continues after the termination of the employment.

In the text C. Wolfram, *Modern Legal Ethics* § 7.4 at 358 (West 1986), the author states:

Under the doctrine that has prevailed, any claim that a lawyer is disqualified because of a former-client representation must satisfy the two criteria of the substantial-relationship test. First, the former representation and the present one must be adverse in some material way. Second, the matters must be substantially related.

The Code has one rule that requires withdrawal:

DR 2-110 Withdrawal from Employment

. . . .

(B) Mandatory withdrawal.

. . . [a] lawyer representing a client in other matters shall withdraw from employment, if:

. . . .

(2) He knows or it is obvious that his continued employment will result in violation of a Disciplinary Rule.

The following are applicable as guides concerning disclosure and disqualification:

EC 5-14 Maintaining the independence of professional judgment required of a lawyer precludes his acceptance or continuation of employment that will adversely affect his judgment on behalf of or dilute his loyalty to a client. . . .

EC 5-15 If a lawyer is requested to undertake or to continue representation of multiple clients having potentially differing interests, he must weigh carefully the possibility that his judgment may be impaired or his loyalty divided if he accepts or continues the employment. He should resolve

all doubts against the propriety of the representation. . . .

EC 5-16 In those instances in which a lawyer is justified in representing two or more clients having differing interests, it is nevertheless essential that each client be given the opportunity to evaluate his need for representation free of any potential conflict and to obtain other counsel if he so desires. . . .

EC 5-19 A lawyer may represent several clients whose interests are not actually or potentially differing. Nevertheless, he should explain any circumstances that might cause a client to question his undivided loyalty. Regardless of the belief of a lawyer that he may properly represent multiple clients, he must defer to a client who holds the contrary belief and withdraw from representation of that client.

As the details of the banking department investigation of Commonwealth became known to respondent, his prior business and lawyer-client relationships with Marvin Copple came into sharp focus as conflicts of interest highlighted by (1) Copple's receipt of the illegal \$500,000 fee from Commonwealth in early 1981, described by Barry Lake as amounting to theft; (2) respondent's own personal knowledge and experience of borrowing large sums of money from Commonwealth in real estate developments with Copple, where the procedures were suspect; (3) the contents of the March 10, 1983, letter from the FBI to Paul Amen that was received by respondent; and (4) confirmation, in June 1983, from Ruth Anne Galter, assistant attorney general, to respondent that there was merit in Lake's

report that Marvin Copple may have stolen money from Commonwealth.

Respondent contends that Lake did not tell him all of the facts about the amount of money that Copple was alleged to have stolen, but, rather, "he told me that they were doing some investigation into a matter and that Marv Copple may have stolen or got money by theft from Commonwealth." However, respondent made no inquiries to determine the facts of this allegation.

It was not enough for respondent to tell Lake that he had prosecuted friends before and if Copple was involved in a crime he would be prosecuted.

Respondent also contends that during this 1982 to 1983 investigation period, he had no duty to either disclose or disqualify because (1) there was statutory authority and interoffice policy that the Attorney General would neither conduct an investigation of an institution then under investigation by the banking department nor institute prosecution of a person that was a part of such investigation until requested to do so by the banking department, and he had received no such request; (2) Paul Amen had directed that respondent take no action since it might "blow the lid off" and destroy the whole industry; and (3) respondent had assigned Ms. Galter to assist in the Commonwealth investigation. These facts were true; however, they do not negate his duties to disclose and disqualify under the Code.

During this time there was deep concern by the Director of Banking and Governor Robert Kerrey for the survival of the whole industrial loan industry in

Nebraska. Key decisions were being made resulting from conferences between those officials and others, including respondent in his role as Attorney General. It was necessary, and those decisionmakers were interested in the subject matter and expected respondent to contribute his independent judgment (Canon 5). Yet respondent did not disclose to these officials his past relationships with Marvin Copple and business associations with Commonwealth, and he did not disqualify himself as Attorney General until November 18, 1983. Governor Kerrey testified that if he had known about respondent's relationships, he would have requested an investigation by some person other than respondent. In disposing of count I, we said, "where one has a duty to speak, but deliberately remains silent, his silence is equivalent to a false representation." That same rationale is applicable here. Respondent had a duty to make a full and truthful disclosure to the interested State officials concerning the nature of his conflicts. His silence was a clear violation of the Code requiring disclosure, without regard to whether or not the outcome of pending or future official investigations would have been changed, and was tantamount to a false representation that there was no conflict.

From the clear and convincing evidence, we conclude, contrary to the finding of the referee and his reliance on *Adams v. Adams*, 156 Neb. 778, 58 N.W.2d 172 (1953), that when respondent was first advised by Lake that Marvin Copple may have stolen money from Commonwealth, respondent clearly had a duty to disclose to the Director of Banking and to Governor Kerrey the existence of his prior lawyer, business, and personal

relationships with Marvin Copple, and also his real estate loan history with Commonwealth. Further, respondent had conflicts in the whole Commonwealth investigation that were adverse in a material way and substantially related, to the end that he had a duty to disqualify himself as Attorney General no later than July 1, 1983, which was a reasonable time after Ms. Galter had confirmed in June 1983 that there was merit in the allegation that Marvin Copple had taken money illegally from Commonwealth. Having failed to disqualify himself until November 18, 1983, respondent violated the Code, and he is subject to discipline.

Respondent contends that under subsection 8D of count XI, the relator was required to show that his failure to disqualify himself "would impair public confidence in the administration of justice in the State of Nebraska and would be prejudicial to the administration of justice."

" 'Violation of any of the ethical standards relating to the practice of law, or any conduct of an attorney in his professional capacity which tends to bring reproach on the courts or the legal profession, constitute [sic] grounds for suspension or disbarment.' " *State ex rel. Nebraska State Bar Assn. v. Strom*, 189 Neb. 146, 151, 201 N.W.2d 391, 393 (1982). The conduct of a government attorney is thus required to be more circumspect than that of a private lawyer. This is the inevitable result of the fact that government attorneys are invested with the public trust and are more visible to the public. As such, improper conduct on the part of a government attorney is more likely to harm the entire system of government in terms of public trust. *Matter*

of Petition for Review of Opinion No. 569, 103 N.J. 325, 511 A.2d 119 (1986).

In *Howell v. State*, 559 S.W.2d 432, 436 (Tex. Civ. App. 1977), the court defined "prejudicial" as meaning "tending to injure or impair; detrimental; harmful; hurtful; [or] injurious," and held that "[c]onduct prejudicial to the administration of justice may consist of any one or more of many acts too numerous to list."

In *State v. Nelson*, 210 Kan. 637, 504 P.2d 211 (1972), the court held that the term "prejudicial" is a word found universally throughout the legal and judicial system and is defined as hurtful, injurious, or disadvantageous.

The failure of respondent to make the required disclosures to the State officials responsible for making major decisions affecting the banking industry and the whole State of Nebraska was compounded by his failure to disqualify himself prior to July 1, 1983. Together, the confidence of the public was impaired, and the effect was an impairment of the administration of justice.

Subsection 8E

This general allegation relates to the November 25, 1983, letter sent by David Domina, special assistant attorney general (appointed by respondent on November 18, 1983, to handle all matters relating to Commonwealth), to respondent, requesting full information concerning respondent's relationships with Marvin Copple and Commonwealth. Instead, respondent's

statements under oath were taken November 30 and December 12, 1983.

By the investigative nature of the statements, we see the main issue here as the duty of respondent to tell the truth. That general issue has been discussed in relation to count I. For that reason, subsection 8E does not require further discussion.

DISCIPLINE TO BE IMPOSED

Having determined that the respondent is subject to discipline, the remaining issue is to determine what discipline is appropriate under the facts and circumstances of this case.

As we stated in *State ex rel. Nebraska State Bar Assn. v. Cook*, 194 Neb. 364, 232 N.W.2d 120 (1975):

The determination of what is appropriate discipline in this case is not without difficulty. Many matters must be considered. These include the nature of the offenses, the need for deterrence of similar future misconduct by others, maintenance of the reputation of the bar as a whole, protection of the public and clients, the expression of condemnation by society on moral grounds of the prohibited conduct, and justice to the respondent, considering all the circumstances and his present or future fitness to continue in the practice of law. Drinker, *Legal Ethics* (1963), pp. 48, 49; *State ex rel. Spillman v. Priest*, 123 Neb. 241, 242 N.W. 433; *In re Dreier*, 258 F.2d 68; *State ex rel. Nebraska State Bar Assn. v. Butterfield*, *supra*; *State ex rel.*

Nebraska State Bar Assn. v. Mathew, 169 Neb. 194, 98 N.W.2d 865; State ex rel. Nebraska State Bar Assn. v. Strom, 189 Neb. 146, 201 N.W.2d 391.

Id. at 384, 232 N.W.2d at 130.

The purpose of a disbarment proceeding is not so much to punish an attorney as it is to determine, in the public interest, whether he should be permitted to continue to practice law. State ex rel. Nebraska State Bar Assn. v. Wiebush, 153 Neb. 583, 45 N.W.2d 583. *State ex rel. Nebraska State Bar Assn. v. Rhodes*, 177 Neb. 650, 660, 131 N.W.2d 118, 125 (1964).

The following matters are of importance in determining the discipline which should be imposed. The record does not show any history of prior violation of respondent's oath as an attorney or of the Code of Professional Responsibility. Insofar as this court is informed, until his involvement with Marvin Copple and the Commonwealth Savings Company, the respondent served honorably as the Attorney General of this state.

It must be recognized that no contention is made that the respondent was responsible for the collapse of Commonwealth Savings Company, and no proceeding has established such responsibility. Although respondent entered into transactions with Copple which resulted in personal gain to the respondent and those transactions enabled Copple to drain funds from Commonwealth at a time when it was in precarious financial condition, the role of the respondent was relatively minor so far as Commonwealth was concerned.

More serious is the fact that the respondent entered into improper transactions with Copple and Commonwealth, which later necessitated his withdrawal from any matters involving Commonwealth at a time when his services were most urgently needed by the State and its Department of Banking.

As we stated in the *Cook* case a 387, 232 N.W.2d at 132:

A judgment of permanent disbarment is a most severe penalty, as anyone who is dependent upon some special skill or knowledge for his own livelihood will quickly recognize if he contemplates for a moment the impact of being deprived by judicial fiat of the use of that skill and knowledge. Disbarment ought not to be imposed for an isolated act unless the act is of such a nature that it is indicative of permanent unfitness to practice law.

Furthermore, we believe there is little likelihood of repetition of unethical conduct by the respondent in the future.

We conclude that the appropriate discipline in this case is suspension from the practice of law for a period of 4 years commencing December 20, 1984.

During the period of suspension the respondent shall not engage in the practice of law in any manner whatsoever in this or any other jurisdiction; shall not engage in any conduct which would subject him to discipline under the disciplinary rules if he were engaged in the practice of law; and shall comply fully with the judgment in this proceeding.

Costs of this proceeding, in the amount of \$36,028.94, are taxed to the respondent. All costs except the respondent's docket fee, in the amount of \$50, having been paid by the relator, the respondent shall reimburse the relator directly in the amount of \$35,978.94.

JUDGMENT OF SUSPENSION.

(Caption Omitted In Printing)

ORDER

(Filed March 18, 1988)

The respondent's motion for rehearing is overruled.

Costs are retaxed in the amount of \$20,460.50 against the respondent for the docket fee in this court, the referee's fee and expenses and the transcript expense, all as shown by the record. Fees and expenses of special counsel in the amount of \$15,858.44 which as shown by the record, have been paid by the relator, are not taxed against the respondent.

Lincoln, Nebraska, March 18, 1988

By the Court

/s/ Leslie Boslaugh
Chief Justice Pro Tem

(Caption Omitted In Printing)

CERTIFICATE OF SERVICE OF
NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

(Received May 13, 1988)

I, William E. Morrow, Jr., a member of the Bar of this Court, hereby certify that on this 12 day of May, 1988, three copies of the Notice of Appeal to the

Supreme Court of the United States in the above-entitled case were mailed, first class postage prepaid, to Dennis Carlson, 635 South 14th Street, P. O. Box 81809, Lincoln, NE 68501, Thomas J. Walsh, 11440 West Center Road, Omaha, NE 68144, and Robert G. Spire, Attorney General, 2115 State Capitol, Lincoln, NE 68509, counsel for all the appellees herein. I further certify that all parties required to be served have been served.

/s/ William E. Morrow, Jr.
William E. Morrow, Jr.
ERICKSON & SEDERSTROM,
P.C. One Merrill Lynch Plaza
10330 Regency Parkway Drive
Omaha, Nebraska 68114
(402) 390-7125
Counsel for Appellant

(Caption Omitted In Printing)

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

Notice is hereby given that Paul L. Douglas, the appellant above named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of Nebraska suspending Appellant from the practice of law entered in the action on December 4, 1987 and modified by an order overruling the Motion for Rehearing entered March 18, 1988.

This appeal is taken pursuant to 28 U.S.C. 1257(2).

PAUL L. DOUGLAS, Appellant

By /s/ William E. Morrow Jr.

William E. Morrow, Jr. - #12936
ERICKSON & SEDERSTROM, P.C.

One Merrill Lynch Plaza
10330 Regency Parkway Drive
Omaha, Nebraska 68114
(402) 390-7125

Counsel for Appellant

(Caption Omitted In Printing)

REPORT OF REFEREE THOMAS R. BURKE

YOUR REFEREE was appointed in November of 1985 by the Supreme Court and filed his oath, pursuant to which he heard and examined the cause captioned above and makes this "just and true report according to the best of my understanding".

Formal hearing was delayed pending the outcome of the criminal appeal in *State vs. Douglas*, No. 85-245, which case was argued in January of 1986 and ended in a reversal of Paul Douglas' criminal conviction in May of 1986. *State vs. Douglas*, 222 Neb. 833. Thereafter preliminary proceedings took place before the Referee, which culminated in the hearing which was held in U.S. District Court and Court of Appeals facilities in Omaha, Nebraska.

This disciplinary matter came before the Referee for public hearing beginning on November 18, 1986 and continued for six (6) days. Over eighty-five (85) exhibits were offered. After taking evidence, hearing witnesses, reviewing the briefs of the parties and hearing oral arguments on December 19, 1986, I submit the following report to the Court pursuant to Disciplinary Rule 10(J) with copies to the Respondent and his attorney, and to the attorneys for the Relator. As a part of this Report, I certify the nine (IX) Volumes of Transcript (887 pages) and the exhibits referred to therein.

The role of a Referee in a disciplinary proceeding is, in appearance, a broad one, but, in practical effect, is much narrower. Although the entire matter has been

referred to the Referee and the Referee's statutory authority encompasses consideration of matters of both fact and law, every issue addressed by this Report is subject to de novo review by the Supreme Court. In this light, the Referee's more valuable roles are those of evidence taker and fact finder because he is the one to hear the witnesses and observe their demeanor. To make recommendations based on the evidence it is necessary to examine and apply the appropriate law. Thus, for such matters as the meaning of the Code of Professional Responsibility or interpretation of criminal or civil laws the Respondent has been charged with violating, the Referee may appropriately attempt to determine matters of law. However, for such overarching legal questions as the constitutionality of the disciplinary rules under which the Referee is acting or of the statutes the Respondent is charged with violating, it seems more appropriate and efficient for the Referee to assume the validity of such rules and laws and leave the question of their constitutionality to the Supreme Court. Also, my disposition of the factual issues make it unnecessary to decide legal issues not presented by the facts as found.

Therefore, I shall pass over the constitutional questions raised in Paragraphs 4 and 5 of the Proposed Order on Pretrial Conference signed by the parties. As fact finder with respect to these questions, though, I note that the evidence and testimony presented before the Referee did not include those matters contained in Paragraphs 1 through 22 of the Respondent's Proposed Findings of Facts and Conclusions of Law, except for the matters contained in Exhibits 53 and 54 and except

to the extent that they are contained in the Transcript of pleadings and orders filed in these proceedings, or the Docket of this case, or the Disciplinary Rules promulgated by the Court, of which I take judicial notice. I do not attempt to determine whether judicial notice may appropriately be taken of other sources in which support may be found for these "facts," including the record of proceedings before bar disciplinary bodies, because no request for judicial notice of these matters has been made. Neither party has requested that I take into consideration any part of the transcript of the bar proceedings or that I include any of it in the present record, other than Exhibit 31, which was received.

Eleven formal charges have been filed by the Relator. Counsel for the Relator represented at the outset of the Referee's hearing that no evidence would be offered with respect to Count X, concerning the perjury conviction reversed by the Court since the charges originally were filed.

The following findings of fact are organized according to the ten remaining counts; as such, there is some degree of duplication of facts pertinent to more than one count. Facts relevant to all counts are set out separately.

While the length and depth of this Report may appear to go beyond the extent of the charges, the Referee is mindful of the public significance of the office held by the Respondent during the time relevant to these charges and the value of a reputation, a name, and a professional status achieved over time through performance of public service.

The law, as a profession, demands self-discipline. This Report, following a lengthy public hearing, is designed to carry out that responsibility of the profession to the public which we serve.

FINDINGS OF FACT¹

Relevant to all counts:

1. On June 18, 1953, Paul L. Douglas ("Respondent") was admitted to the practice of law in the State of Nebraska by the Supreme Court of the State of Nebraska, and was continuously licensed to practice law in the State of Nebraska until December 20, 1984, when at age 57 his license to practice law was suspended by order of the Nebraska Supreme Court. So far as the record here is concerned, Respondent's reputation, both professionally and personally, prior to the filing of the charges which were the subject of this hearing, was such that permitted him to be elected to statewide office.

2. In 1956, Respondent was appointed Deputy County Attorney for Lancaster County, Nebraska and subsequently served as Chief Deputy Lancaster County Attorney from 1959 to 1961. Respondent served as the elected Lancaster County Attorney from 1961 to 1975.

¹ Parenthetical citations refer to the transcript of testimony before the Referee according to page numbers (e.g., T 709-11) or page and line numbers (e.g., T 709:11-711:14) or refer to exhibits admitted by the Referee, including page numbers when possible (e.g., Ex. 32, pp. 24-25, 36).

From January 1975 until the effective date of his resignation, January 2, 1985, the Respondent was the duly elected, qualified and acting Attorney General of the State of Nebraska.

3. Prior to 1976, the Respondent and Paul E. Galter, an attorney licensed to practice law in Nebraska, had been personal friends for several years and had together invested in commodities markets, resulting in losses of approximately \$40,000, which they together financed with loans from financial institutions and which in 1976 they were unable to pay from resources then available to them. (Ex. 23, p. 10) To make such investments, they acted through a partnership checking account in the name of a joint venture called PPSS, of which they were the only participants as of 1976.

4. From 1976 until 1983, Marvin E. Copple was a vice president and director of Commonwealth Savings Company ("Commonwealth"), an industrial loan and investment company chartered by the State of Nebraska, and also was a businessman active in the development of commercial and residential real estate.

5. Prior to 1976, Paul E. Galter and Marvin E. Copple had been personal friends for many years and had engaged in a business enterprise that was losing money. (T 609) Also, Paul Galter was Marvin Copple's attorney and had, since 1972, provided legal representation to Commonwealth. (T 611)

6. In March 1976, Marvin Copple proposed that Paul Galter assist Copple in developing a tract of land in Lincoln, Nebraska that he planned to purchase and develop under the name Fox Hollow. (T 610) Less than

a week later, Paul Galter asked Marvin Copple to include the Respondent so that the Respondent could supplement his income as Attorney General and repay the commodity losses he and Galter had suffered, and Copple agreed. (T 610-12) Soon after Galter's proposal to include the Respondent, Galter, Copple, and the Respondent met to discuss the development project. (T 612) They agreed orally that Copple would supply the capital for the development and Galter and the Respondent would perform a portion of the necessary work, including legal work. (T 613)

7. Marvin Copple, Paul Galter, and the Respondent agreed orally that Galter and the Respondent would be compensated for their services with respect to the Fox Hollow development by means of an arrangement by which Copple would convey certain lots in the development to Galter and the Respondent at specified prices, and, once Copple had found third-party purchasers for the lots, Galter and the Respondent would convey the lots to the third parties, pay to Copple the original purchase price, and retain the balance as compensation for services to Copple. Under the arrangement, as originally agreed, Galter and the Respondent were not to pay to Copple the original purchase price on any lots until Copple had sold the lots to third parties. (T 627-32)

8. In furtherance of the Fox Hollow compensation agreement, Marvin Copple as the seller and Paul Galter and the Respondent as the buyers signed three (3) Purchase Agreements, dated January 12, 1977, September 8, 1977, and June 1, 1979, respectively (Exs. 5, 7, 9). The January 12, 1977 agreement described 26 lots

in Fox Hollow, which the agreement said Galter and the Respondent agreed to purchase for a total purchase price of \$241,774.00; the agreement specified that \$100 per lot was paid "at the time of the execution of this agreement, the receipt of which is hereby acknowledged by Seller," and the balance for each lot was to be paid either at the time a building permit was secured for improvements on such lot or at the time such lot was sold and an interest was conveyed; "provided, however, that the full purchase price for each lot, plus interest as provided hereafter, shall be paid not later than January 12, 1978"; the agreement also provided for semiannual payment of interest at 8.75 percent, commencing 120 days after the date of the agreement. The September 8, 1977 agreement had identical provisions, except that it described 40 lots for a total purchase price of \$320,755.00, to be paid no later than September 8, 1978. The June 1, 1979 agreement also was identical, except that it described 12 lots for a total purchase price of \$105,600.00. Although each agreement required and acknowledged a down payment, none was made, nor was any interest paid under the purchase agreements. (T 632; Ex. 31, p. 91)

9. During the years 1977, 1978 and 1979, all of the lots described in the three purchase agreements were sold to third parties, the majority of them being purchased ostensibly by Marvin Copple's secretary Judith Driscoll. (Compare Exs. 5, 7 and 9 with Ex. 58)

10. The Respondent performed services for Marvin Copple with respect to the Fox Hollow development and another real estate development being undertaken by Copple called Timber Ridge. The Respondent's services

began in 1976 and ended in 1981. Although the parties originally contemplated that Paul Galter would perform all necessary legal services, while the Respondent would perform nonlegal tasks (T 677-78), the Respondent's services included services of a type ordinarily performed by an attorney for a client (T 717), and at least a loosely structured attorney-client relationship existed between the Respondent and Marvin Copple with respect to Copple's real estate development activities (T 718, 734).

11. On April 20, 1977, the Respondent, at Marvin Copple's request, executed a promissory note to Commonwealth in the principal amount of \$241,774.00 and further executed a mortgage to Commonwealth upon the 26 lots described in the January 12, 1977 purchase agreement between the Respondent, Paul Galter and Marvin Copple. Paul Galter guaranteed the Respondent's promissory note. The promissory note provided for 8.75 percent interest per annum and required final payment by October 20, 1977. Commonwealth on April 20, 1977 issued a check in the principal amount of the loan to the Respondent, Copple, and Galter, and the Respondent and Galter endorsed the check to Copple. Commonwealth extended the promissory note from time to time, until the Respondent repaid the remaining balance on August 30, 1979 after the sale of the last of the 26 lots described in the January 12, 1977 purchase agreement.

12. After entering into the April 20, 1977 mortgage transaction with Commonwealth, the Respondent and Paul Galter told Marvin Copple that they did not wish to enter similar arrangements with respect to future lot

transactions pursuant to the Fox Hollow compensation plan. No mortgage to or loan from Commonwealth was involved with the September 9, 1977 or the June 1, 1979 real estate purchase agreements.

13. As a result of the sale of all lots described in the three purchase agreements, the Respondent and Paul Galter each realized a total profit of approximately \$44,772.00.

14. In addition to profits from lot sales, the Respondent asked Marvin Copple to pay him directly for services related to Copple's real estate developments. Copple wrote six checks to the Respondent in the following amounts:

| | |
|-------------------|-------------|
| December 19, 1978 | \$ 5,000.00 |
| April 12, 1979 | 5,000.00 |
| September 5, 1979 | 7,500.00 |
| April 25, 1980 | 2,500.00 |
| August 29, 1980 | 5,000.00 |
| December 27, 1980 | 15,000.00 |

The total of the six checks was \$40,000. The April 25, 1980 check for \$2,500 apparently was for the purpose of reimbursement for expenses related to the Timber Ridge development, and the Respondent paid all but \$1,100 of the check's proceeds to the Register of Deeds and to Paul Galter. (T 666; Ex. 81; Ex. 32, pp. 172) The Respondent retained the proceeds from the other five checks, in a total amount of \$37,500, for compensation for his services on various aspects of the Fox Hollow and Timber Ridge developments.

Relevant to Count I:

15. On November 1, 1983, the Director of the Department of Banking and Finance for the State of Nebraska declared Commonwealth insolvent and took possession of it pursuant to the statutes of Nebraska.

16. Shortly before November 18, 1983, the Respondent decided to disqualify himself and his office from handling all legal matters relating to Commonwealth.

17. On November 18, 1983, the Respondent appointed attorney David A. Domina as Special Assistant Attorney General to handle all legal matters relating to Commonwealth. (Ex. 21)

18. On or about November 10, 1983, Paul Amen resigned as Director of the Department of Banking and Finance (T 304) and John Miller was appointed by the Governor as the Interim Director.

19. On November 25, 1983, David Domina addressed a letter to the Respondent requesting, among other things, a narrative description of the history of the Respondent's acquaintance and personal or social relationships with several named persons, including Marvin Copple and Commonwealth; a history of all of his business relationships with Marvin Copple or Commonwealth; a description of all real estate transactions or loans with them; and any payments received by the Respondent from either of them as compensation for any services rendered. (Ex. 22)

20. Instead of waiting for the narrative statement for the seven days requested in his November 25, 1983 letter, David Domina, with the Respondent's consent,

took the Respondent's statement under oath, after the "Miranda warnings", on November 30, 1983. (Ex. 23, p. 1) Present were the Respondent, Domina, a court reporter, Interim Director John Miller of the Department of Banking and Finance, and Lancaster County Attorney Michael Heavican. The same persons also were present for a second statement of the Respondent taken under oath, also after the "Miranda warnings", on December 12, 1983. (Ex. 24, p. 1)

21. The November 30 and December 12, 1983 statements of the Respondent were taken in a question-and-answer format, the questions mostly being asked by David Domina. In response to questions, the Respondent described the agreement between himself, Paul Galter, and Marvin Copple for the discounted sale of lots in Fox Hollow to the Respondent and Galter and resale to third parties as a means of compensating the Respondent and Galter for their assistance with the Fox Hollow developments. (Ex. 23) The Respondent also showed to Domina the three purchase agreements and traced the sales of lots from Copple to himself and from him to third parties, including Copple's secretary Judith Driscoll. (Ex. 24) The Respondent allowed Domina to look at his federal income tax returns for the relevant years to see how he had treated the lot transactions, but did not allow copies to be made. (Ex. 24, pp. 45-46)

22. The Respondent told Domina, "I have never served as Marv Copple's lawyer," but agreed that he "counseled Marvin Copple in some nonlegal way for pay." (Ex. 23, p. 9)

23. When asked about his involvement with Marvin Copple's development known as Timber Ridge, the Respondent said he did not invest any money in it, but that he served as counsel in connection with the development and received compensation. (Ex. 23, p. 17)

24. Although Domina questioned Respondent over two days and Exhibits 23 and 24 extend to 180 pages of testimony, Domina did not ask the Respondent how much he was compensated for work connected with Timber Ridge or what form the compensation took.

25. On November 30, 1983, David Domina asked if there were developments "besides Fox Hollow and Timber Ridge for which you were paid for services as counsel?" The Respondent answered, "There was always something coming up, and as it was requiring my time and my counsel and I would remind him of it and periodically he would pay me for it." (Ex. 23, p. 18) After discussion of Copple's motels and horse breeding farm, the Respondent said that "for all practical purposes the large bulk of the time, and what I would really consider my involvement with Marv, would be Fox Hollow and Timber Ridge." (p. 18) Domina then asked, "Did you ever specifically bill Mr. Copple for your counsel on these other projects other than Fox Hollow and Timber Ridge?" (pp. 18-19) Answer: "No." Question: "Did you ever give him orally, you know, a figure or ask for a specific amount of compensation on those other projects?" Answer: "No." Question: "How did he pay you for your services on the projects other than Fox Hollow and Timber Ridge or did he?" Answer: "He never did pay me." (p. 19) Question: "With respect to Fox Hollow, then, what was the arrangement that

you had with Mr. Copple for compensation for your services as counsel, then?" (19:12-14) The Respondent answered by describing the lot purchase agreements and the manner in which he and Paul Galter were paid by the sale of lots. The Respondent was not asked specifically and did not tell Domina in response to this series of questions or at any other time on November 30 or December 12 that he received compensation for work on Fox Hollow and Timber Ridge by means of checks written to him by Marvin Copple. The only question by Domina to which discussion of the Copple checks would have been a responsive answer was the question at page 19, lines 12-14, quoted above.

26. On December 12, David Domina asked the Respondent what his interest in Timber Ridge was. The Respondent replied that Marvin Copple had agreed that when the property was platted, the Respondent and Paul Galter each would receive a 10 percent ownership interest as compensation for their work on its development. (Ex. 24, pp. 24-25) Domina did not ask whether the Respondent actually received the 10 percent interest or if he received any other form of compensation for work on Timber Ridge. Instead, Domina asked whether the Timber Ridge compensation plan was the same as for Fox Hollow, to which the Respondent replied that it was not. The Respondent was not asked for, nor did he volunteer, the information that instead of an ownership interest in Timber Ridge, he received direct payments by check from Marvin Copple.

27. The first \$5,000 check from Marvin Copple to the Respondent was related to work the Respondent did in arranging installation of storm sewers in Fox Hollow

Second Addition. (Exs. 13, 13A) The next payment of \$5,000 was related to Fox Hollow sewer and street work. (Exs. 14, 14A) The third payment, for \$7,500, related to services on the Timber Ridge development. (Exs. 15, 15A) The fourth check, for \$2,500, was intended by Marvin Copple as compensation for expenses incurred in connection with Timber Ridge, and the Respondent retained only \$1,100 of this amount. (Ex. 32, pp. 169-72) The fifth check, for \$5,000, was for the Respondent's efforts in negotiating with the U.S. Army Corps of Engineers concerning a flowage easement preventing development of some Fox Hollow First Addition lots. (Exs. 17, 17A) The final check, for \$15,000, also was related to the problem with the Corps of Engineers. (Exs. 18, 18A) (See generally T 67-84)

28. There is no evidence that the Respondent received any compensation in any form for any services rendered to Marvin Copple on matters other than the Fox Hollow and Timber Ridge developments. The Respondent's only compensation for work on Timber Ridge was by check, as detailed above. His compensation for work on Fox Hollow was both by check and by profits from sales of lots.

29. There is no direct evidence that the Respondent intended to conceal from David Domina the fact that the Respondent had received direct payments from Marvin Copple for his work on Copple's real estate developments.² Although the Respondent bypassed

² Most of these direct payments were listed as "Management fees" on the Respondent's tax returns for 1978, 1979 and 1980, but the returns did not show the source of the income. (Exs. 76, 79, 80)

opportunities during the November 30 and December 12, 1983 Questioning to reveal details of the direct payments from Copple he did state that Copple paid him (Ex. 23, p. 18) and although his answer to the question concerning compensation for Fox Hollow work (Ex. 23, p. 19:12-14) discussed only the lot transactions and did not include the direct payments by check, I conclude that the Respondent did not intentionally withhold that information from Domina. The Respondent reasonably could have perceived that the November 30 and December 12, 1983 statements were being taken in an adversarial context and that his responses could be used against him. "Q. Anything that you say or may say can and will be used against you in proceedings in court of any kind or nature. Do you understand that? A. I do." Ex. 23, p. 4:5-8. Anything you say may and you should presume will be used against you in legal proceedings in court, do you understand that? A. I can assume they will be used against me? Q. You should indulge in that assumption, yes." (Ex. 24, p. 2:18-22) It is apparent from the Respondent's willingness to answer other questions put to him by Domina that he would have disclosed his receipt of direct payments from Copple had Domina followed up the several opportunities he had to ask more specific questions about compensation other than the lot arrangements. The questions most directly relating to compensation were specifically limited to projects other than Fox Hollow and Timber Ridge, except for the question at p. 19:12-14. The Respondent, answer to the latter question was truthful with respect to the lot sales agreement, and his opportunity to complete his answer by

disclosing the direct payments was cut off by Domina's follow-up questions limited to the lot transactions.

30. After David Domina and John Miller issued a report partially based on their interviews with the Respondent (Miller-Domina Report), the Respondent wrote a letter (Ex. 28) to the special counsel for the Special Commonwealth Committee of the Nebraska Legislature, in which he disclosed the receipt of \$32,500.00 in direct payments from Marvin Copple for services on the Fox Hollow and Timber Ridge developments. Domina first learned that direct payments had been made by Copple when he read a copy of Exhibit 28. (T 129-30)

Relevant to Counts II through VI:

31. On February 27, 1978, the Respondent filed with the Nebraska Accountability and Disclosure Commission a Statement of Financial Interests for the year 1977 on a form supplied by the Commission pursuant to Neb. Rev. Stat. §49-1496 (Cum. Supp. 1976). (Ex. 10)

32. On March 12, 1979, the Respondent filed with the Nebraska Accountability and Disclosure Commission a Statement of Financial Interests for the year 1978 on a form supplied by the Commission pursuant to Neb. Rev. Stat. §49-1496 (Reissue 1978).

33. On both the 1977 and 1978 forms the Respondent answered "None" in response to the following question (Item 11): "Name and address of each creditor to whom the value of \$1,000 or more was owed by you or a member of your immediate family."

34. The Commission's instructions for answering Item 11 on both the 1977 and 1978 forms provided, "The following need not be included: Accounts payable, debts arising out of retail installment transactions or from loans made by financial institutions in the ordinary course of business, loans from a relative, and land contracts that have been recorded with the County Clerk or the Register of Deeds." (Ex. 69)

35. On March 26, 1980, the Respondent filed with the Nebraska Accountability and Disclosure Commission a Statement of Financial Interests for the year 1979 on a form supplied by the Commission pursuant to Neb. Rev. Stat. §49-1496 (Reissue 1978). (Ex. 10)

36. On March 17, 1981, the Respondent filed with the Nebraska Accountability and Disclosure Commission a Statement of Financial Interests for the year 1980 on a form supplied by the commission pursuant to Neb. Rev. Stat. §49-1496 (Reissue 1978). (Ex. 10)

37. On both the 1979 and 1980 forms, the Respondent answered, "None," in response to the following question (Item 10): "Creditors to whom \$1,000 or more was owed by you or member of your family (see instruction, Item 10, for exclusions)." (Ex. 10)

38. The Commission's instructions for answering Item 10 on both the 1979 and 1980 forms provided, "Include all liabilities by name and address of each creditor except accounts payable, debts arising out or retail installment transactions or from loans made by financial institutions in the ordinary course of business, loans from a relative and land contracts that have

been recorded with the county Clerk or the Register of Deeds." (Ex. 70)

39. Commonwealth was a "financial institution".

40. Marvin Copple and his real estate development business were not "financial institutions".

41. The purchase agreements between the Respondent, Paul Galter, and Marvin Copple to provide compensation for services on the Fox Hollow development were not "land contracts that have been recorded with the County Clerk or the Register of Deeds." (T 431)

42. In item 8 of his 1978 Statement of Financial Interests, in response to instructions to list the name, address and nature of business of persons from whom any income or gift of \$1,000 or more was received and the nature of services rendered or circumstances of gift, the Respondent included, among other items, "Foxhollow Development", at 1200 Manchester Drive in Lincoln, and stated the nature of business as "Real Estate" and the nature of services rendered as "Land Development". (Exhibit 10)

43. In item 6 of his 1979 Statement of Financial Interests, in response to instructions to list the names and addresses of places of employment and businesses and the nature of the association, the Respondent listed "Foxhollow Development", at 1200 Manchester Drive in Lincoln, listed the nature of the association as "Owner of certain lots", and identified the nature of the payor's business and services he rendered as "Land development. Made judgement (sic) decisions and financial investments." (Exhibit 10)

44. In item 6 of his 1980 Statement of Financial Interests, in response to instructions to list the names and addresses of places of employment and businesses and the nature of the association, the Respondent listed "Foxhollow Development", at 1200 Manchester Drive in Lincoln, listed the nature of the association as "Real Estate Development", and identified the nature of the payor's business as services he rendered as "Land development. Made judgment decisions and financial investments." (Exhibit 10)

45. Exhibit 10 includes an unsigned version of a Statement of Financial Interests for the year 1980 which is identical to the signed version of the 1980 Statement except for two items. In the space at the end of the form reserved for additional information or explanation, there appears the following: "This is an amended report filed pursuant to and under the terms and conditions of a stipulation and order." Also item 6 has an additional listing of Marvin L. Copple at 1200 Manchester Drive in Lincoln, the nature of association is listed as Paid Consultant", and the nature of the payor's business and services rendered are listed as "Real estate development by sole proprietorship". The evidence does not reveal whether this amended 1980 Statement or a signed copy of it was ever filed with the Nebraska Accountability and Disclosure Commission, nor does the evidence disclose the circumstances by which the amended statement was created.

46. Marvin Copple's mailing address for his activities as a real estate developer was 1200 Manchester Drive, Lincoln, Nebraska.

47. The Respondent, Paul Galter, and Marvin Copple did not intend that the purchase agreements be binding in all of their terms, but they did manifest an intent to be bound by what they understood their agreement to be that the Respondent and Galter would buy the lots and Copple would sell them to others on their behalf. The majority of the lots were purchased by Copple's secretary Judith Driscoll with money loaned to her by Commonwealth at Marvin Copple's request.

48. In each instance of a sale of a lot to a third party described in one of the Fox Hollow purchase agreements, Marvin Copple executed a deed upon the lot transferring its ownership to the Respondent, whether or not the purchase price from the third party exceeded the price the Respondent and Paul Galter had agreed to pay Copple for the lot.

49. Despite language in the purchase agreements requiring payment of earnest money and interest, the Respondent and Paul Galter did not pay earnest money or interest to Marvin Copple nor did Marvin Copple intend to receive same.

50. The January 12, 1977 purchase agreement was superceded or discharged on or about April 20, 1977, when Marvin Copple deeded to the Respondent the 26 lots described in the January 12 purchase agreement, the Respondent executed a promissory note in the amount of \$241,744.00 and a mortgage on the 26 lots to Commonwealth, and the Respondent and Paul Galter endorsed to Copple the loan proceeds in payment for the 26 lots.

51. On his 1977 federal income tax return (Ex. 75), the Respondent treated the profits from the sale of his undivided one-half interest in 40 real estate lots as short-term capital gains upon property acquired "9/8/77" and sold "12/27/77". These 40 lots were the 40 lots described in the September 8, 1977 purchase agreement (Ex. 7). The Respondent also treated as short-term capital gains the sale of 10 lots acquired "4/20/77" and sold "1977" and of 14 lots acquired "4/20/77" and sold during 1977 on installment contracts.

52. On his 1979 federal income tax return (Ex. 79), the Respondent treated the profits from the sale of 12 lots as short-term capital gains upon property acquired "6-1-79" and sold "7-20-79". On July 20, 1979, Judith Driscoll purchased the 12 lots described in the June 1, 1979 purchase agreement (Ex. 9). The deeds for these 12 lots from Marvin Copple to the Respondent and the deeds from the Respondent to Driscoll all were dated July 20, 1979.

53. Also on his 1979 federal income tax return, the Respondent treated the profits from the sale of 10 lots as long-term capital gains upon property acquired "4-20-77" and sold "8-30-79." These 10 lots were the last to be sold of the 26 described in the January 12, 1977 agreement and covered by the April 20, 1977 Commonwealth mortgage, and apparently included eight lots sold on installment contracts in 1977 but for which the installment purchasers did not perform under the land contracts.

54. Of the 40 lots described in the September 8, 1977 purchase agreement, 30 were deeded by Marvin

Copple to the Respondent on December 27, 1977, and by the Respondent to Judith Driscoll on December 29, 1977. The abstracts for the remaining 10 lots (Ex. 58) do not show the Respondent in the chain of title, but instead show deeds directly from Copple to Driscoll dated January 17, 1978. There is no explanation in the record as to why the Respondent claimed capital gains in 1977 upon 10 lots whose abstracts do not show him in their chain of title and instead show 1978 deeds to others, other than evidence that the purchase price paid to him by Galter was meant to pay for all 40 lots.

Relevant to Counts VII, VIII and IX:

55. The Respondent did not initially report on his 1980 federal income tax return the \$5,000 that he received on August 29, 1980 from Marvin Copple. The evidence offers no explanation of why this amount was not accounted for on the original return. (See Ex. 32, pp. 172-74) 56. After David Domina and John Miller issued their report of January 20, 1984 – critical of the Respondent, in the Respondent's opinion – the Respondent wrote a lengthy response addressed to Richard G. Kopf, special counsel to the Special Commonwealth Committee of the Nebraska Legislature. (Ex. 26) The response was dated February 6, 1984.

57. In his response to the Domina-Miller report, the Respondent pointed out that he had advised Domina that Marvin Copple had made payments to him from time to time, but "no one has ever asked me whether or not the only payments I received for my services in connection with all the real estate developments in which Paul Galter, Marvin Copple and I were involved

were received as profits from the lot sales. Because of the extensive additional work which I did and in which Paul Galter had little participation relating to the noise problems, alternative construction methods, the flowage easement and miscellaneous other matters, I was paid a total of \$32,500 during 1978, 1979 and 1980. For more than 1,500 hours of work over a period of five years, I received a total of \$77,272.11." (Ex. 26, p. 33)

58. The response letter to Kopf was prepared by the Respondent, his attorney, and Paul Galter during a brief period of time after release of the Domina-Miller report. Those preparing the response relied on documents in their possession. The Respondent relied upon copies of his tax returns in arriving at the \$32,500 total of direct compensation from Marvin Copple. (Ex. 32 pp. 141-42) On his 1978, 1979 and original 1980 returns, the Respondent had listed a total of \$32,500 in miscellaneous earned income, which was described as "management fees." In preparing the response to Kopf, the Respondent did not consult his bank records, which would have disclosed the additional \$5,000 payment. (Ex. 32 p. 142; T. 709)

59. The Respondent testified before the Special Commonwealth Committee of the Nebraska Legislature on February 25, 1984, under oath. His preliminary statement and testimony in response to questions were recorded by a court reporter and a transcript thereof is numbered as Exhibit 30 in this record.

60. The Respondent told the Committee that he had received a total of \$32,500 in checks from Marvin Copple. The Respondent testified that he had answered

David Domina's questions truthfully, but had not volunteered information about his receipt of \$32,500 when Domina did not pursue the topic of payments received from Copple. The Respondent testified:

Now, he didn't pursue that. It is quite obvious that I didn't volunteer it, and I should have. On the next - Later on on that page [referring to the page on which Domina asked if there were developments other than Fox Hollow and Timber Ridge for which the Respondent was paid for services as counsel], he asks the question slightly different, and I played the part of the lawyer and answered his question. Again, I say, I should have told him. "Did you especially bill Mr. Copple for your counsel on these other projects other than Fox Hollow and Timber Ridge"? and the answer was, "No", and that is a correct answer, but I knew what he wanted. "Did you ever give him orally, you know, a figure or ask for a specific amount for compensation on these other projects"? The answer was, "No". "How did he pay you for your services on the project other than Fox Hollow? How did he pay you for your services on the projects other than Fox Hollow and Timber Ridge, or did he"? I answered the first part of the question by saying "He never did pay me", meaning he never did pay me for projects other than Fox Hollow and Timber Ridge, and I realize that when I got my statement, and one of the first things we talked about, and one of the things that I did in the two-week period of time was to put it in the report, not only put it in that I had gotten paid, but tell you the exact amount of money that I made. (Ex. 30, p. 442)

61. During his testimony before the Committee, the Respondent also made other references to receipt of

\$32,500 from Marvin Copple. He never told the Committee that he had received an additional check from Copple for \$5,000, for a total of \$37,500.

62. The Respondent told the Committee, "I have turned over my entire income tax returns from '75 through '82 to Mr. Kopf. He has seen that I put all of that money which was paid to me for the work I had done in, I think, three or four different checks into my account, and I paid income tax on it, and I think Mr. Kopf will acknowledge that." (Ex. 30, p. 443) He also testified, "I was paid by check. And those were deposited in my account, and I paid tax on it . . ." (Ex. 30, p. 481)

63. The Respondent filed an amended federal tax return for the year 1980 after seeing news reports after June 14, 1984, which listed checks he had received from Marvin Copple, and after examining his bank deposit slips and finding a check for \$5,000 which he had failed to account for on his original return for 1980. (T 709-11; Ex. 23, pp. 174-76)

64. The Respondent's original 1980 federal income tax return was prepared by accountants retained by the Respondent. The \$5,000 check dated August 29, 1980 was not reported on the original return for 1980. There is no evidence of intent on the part of the Respondent to falsely state the amount of his income for 1980. (See Ex. 32, pp. 142-44)

65. There is no evidence that the Respondent actually knew that he was omitting \$5,000 at the time that he told Richard Kopf and the Special Commonwealth Committee that he had received \$32,500 in the compensation from Marvin Copple. (See Ex. 31, pp. 141-44)

Nor is there any evidence that he intended to deceive anyone about his receipt of the additional \$5,000. (Ex. 32, pp. 172-81)

66. There is no evidence that the Respondent was aware that he had omitted \$5,000 from his 1980 federal income tax return when he told the Special Commonwealth Committee that he had paid taxes on all checks he received from Marvin Copple.

Relevant to Count XI:

67. In addition to those findings shown relevant to all counts, see those findings relevant to Counts I, VII, VIII and IX and paragraphs 47 through 54.

68. As it appeared to the Respondent, Marvin Copple's motivation for agreeing to include the Respondent in the development process for Fox Hollow and Timber Ridge developments included a desire to help a friend (Douglas) of his long-time friend Paul Galter, a perceived need for more help with the necessary tasks associated with a large real estate development project, a desire to accomplish the development quickly, and the perception that the Respondent's contacts developed during his years of public service and his familiarity with governmental processes might allow him to accomplish necessary development tasks even though the Respondent had no experience with real estate developments. There is no evidence that Copple displayed to the Respondent a belief that the Respondent could be influenced in his duties as Attorney General or an expectation that the Respondent would use his influence as a public official for Copple's private benefit.

69. Before the Respondent, Marvin Copple and Paul Galter first agreed to work together on the Fox Hollow project, the Respondent told Galter that he would not be able to work on Copple's projects during working hours and could not use his office staff or facilities and that he did not want to make public appearances or do anything that would create a problem for him as Attorney General. Galter told the Respondent, and the Respondent concluded, that participation in the real estate development project would not come in conflict with his public duties. The Respondent told Copple that he could not make public appearances or use his office staff. (T 614-15)

70. There is no evidence that at the time the Respondent agreed to participate in the Fox Hollow project he knew of any circumstances about Marvin Copple or Commonwealth that should have caused him to anticipate that the Attorney General's office might become involved in an investigation or prosecution of any activities of Marvin Copple or Commonwealth or any of its officers or directors.

71. During the time that the Respondent worked on Marvin Copple's real estate projects, the policy of the Attorney General's office was that lawyers who were employees of the office could not perform private legal work without specific approval, and that approval generally was limited to work for relatives or minor matters. One purpose of the policy was that when public officials provide private legal representation it is not always possible to foresee whether a conflict of interest might arise later between the private work and the

attorney's role as a public official. There were no statutory provisions precluding outside employment on the part of the Attorney General in effect at the time. (T 226-27)

72. Early in the Respondent's involvement, Marvin Copple became concerned about what he perceived to be a delay in condemnation proceedings by the City of Lincoln to obtain an easement for sewage lines across property adjacent to his Fox Hollow property. The easement across the adjacent property, known as the DuTeau property, was necessary to provide sewage services to Fox Hollow. The Respondent and Paul Galter inquired into the causes of the delay. Galter arranged a meeting between himself, the Respondent, and City Attorney Charles Humble concerning the DuTeau easement. Galter and the Respondent informed Humble that they were appearing for Marvin Copple. Humble informed them that the city already was preparing the condemnation. (T 619-21, 666-67) After that the city did commence and carry through condemnation proceedings and obtained the easement, without further involvement of the Respondent, Galter or Copple. (T 216-17, 557-61, 575-81) Galter, Copple and the Respondent attended, but did not formally appear at, the condemnation hearing. (T 73, 217)

73. In the development of a new subdivision, the City of Lincoln allowed developers to create special assessment districts for the installation of utilities, or allowed them to install utilities themselves before or after application for the final plat. Installation by the developer would be approved by means of an executive order from the mayor. Installation of utilities by the

executive order method enabled the development to progress more rapidly than it would if special assessment districts were created. (T 562-67)

74. Marvin Copple wished to make use of the executive order method for utilities installation in order to complete his projects more rapidly, but he did not know how to use it. The Respondent investigated the executive order procedure and advised Copple and Galter as to how to use it. The Respondent also researched whether a bond needed to be posted to ensure installation of utilities, or whether the premium for the bond could be saved by using an escrow arrangement, and found that the latter could be used. (T 617-19)

75. During development of one of the Fox Hollow additions, it was discovered that the U.S. Army Corps of Engineers owned a flood plain easement that prohibited the building of residences on several of the lots. The Respondent and Paul Galter met with two Corps lawyers in Omaha and stated that they were involved in a real estate development and were, respectively, acting in their personal capacity. The Respondent and Galter offered to trade lots with the Corps. The Corps declined the offer. At the Corps, suggestion, the Respondent then contacted the U.S. Attorney and an administrative assistant on U.S. Senator J.J. Exon's staff, William Hoppner, about the easement problem, but had no success. (T 221-22; Ex. 32, pp. 263-64) As of the time of Marvin Copple's deposition, there had been no change in the Corps, position on the easement. (T 219-22, 682-84)

76. When the Lincoln Electric System (LES) disclosed plans to obtain an easement for a power line bordering several lots in the Fox Hollow development, Paul Galter appeared before the LES Power Review Board to oppose the plan on Marvin Copple's behalf. The Respondent researched the effect of the power line and prepared materials for Galter to present to the Board. The Respondent attended the meeting at which Galter appeared, but did not participate in the hearing. (T 222-23, 623-25, 685-86)

77. Marvin Copple's plans for residential development of Timber Ridge were blocked when the City of Lincoln opposed the plan because of a study showing excessive noise pollution, caused in part by the nighttime flights of Air Force planes based at Offutt Air Force Base into the Lincoln Airport, near Timber Ridge. The Respondent telephoned an Air Force general at the Strategic Air Command base to inquire whether SAC planned to continue the night flights into Lincoln. The Respondent had previously met the general, who is not identified in the record, at a reception he had attended in his capacity as Attorney General at the SAC base. The Respondent told the general that he was involved privately in a business venture with other people, and asked about Air Force plans concerning the flights. The general said that he would get back to the Respondent. Instead, the Respondent received a letter addressed to him as Attorney General at his state office. The letter, signed by Air Force Colonel John R. McKone, a different person than the officer referred to earlier, listed several questions purportedly posed by "the Honorable

Paul Douglas" and answers about Air Force plans concerning the planes using the Lincoln airport. (T. pp. 200-06, 687-88; Ex. 35)

78. During his representation of Marvin Copple, the Respondent never appeared before the Lincoln City Council or city planning board. (T 617) Another lawyer was hired to appear on Copple's behalf before those bodies with respect to the noise studies related to Timber Ridge. (T 223-24)

79. There is no evidence, other than inferences that could be drawn from Exhibit 35, that the Respondent ever led any public official to believe that he was acting as Attorney General when he was actually representing his own or Marvin Copple's private interests. Nor is there any evidence that he ever failed to reveal that he was acting in a private capacity when he contacted any public officials in the course of his representation of Marvin Copple.

80. The three purchase agreements for 78 lots in Fox Hollow did not reflect the actual agreement of the Respondent, Marvin Copple and Paul Galter concerning compensation of the Respondent and Galter for their services to Copple. The written purchase agreements, Exhibits 5, 7 and 9, were contract forms drafted for use when Fox Hollow lots were sold to builders (T 631; Ex. 31, p. 93); as such, they provided for interest, down payments and full payment at the point of resale, issuance of a building permit, or expiration of a year from the date of the agreements. The parties to the agreements did not intend that the "buyers" would pay interest or the specified down payment (Ex. 31, p. 92) or that

full payment would be due in a year if the lots were not yet sold to third parties – or that payment would ever be due for lots never sold to others. They did apparently intend to be bound by the designation of which lots were covered by the agreements (but see T 632), the purchase price per lot, and the provision requiring that the seller convey the lots by warranty deed to the buyers upon payment in full as shown by their subsequent course of conduct. Although no interest was paid, or expected, the agreements all contained a handwritten term specifying the interest rate to be 8 $\frac{3}{4}$ percent.

81. The lot purchase agreements, standing alone, appeared to evidence transactions that could be characterized for federal income tax purposes as capital gains or capital losses, once the lots were sold to third parties. (T 214-15) The terms of the agreements could be used to support a tax position that the acquisition dates of the lots for the Respondent and Paul Galter were the dates of the purchase agreements for the purpose of determining the beginning of the holding period of the lots with short-term or long-term status, depending upon the dates of their eventual sales to others.

82. Nothing in the record establishes directly that the Respondent showed any of the purchase agreements to any third party for the purpose of inducing their reliance upon terms by which he did not actually intend to be bound. However, there is circumstantial evidence that the Respondent induced others to treat as legally effective information he supplied based on non-binding provisions of the lot purchase agreements. The Respondent's federal income tax returns for the years 1977 and 1979 were prepared by an accounting firm. (T

881-82) The return for 1977 (Ex. 75) declared the profit on sales of 40 lots as short-term capital gain and listed the "date acquired" as "9/8/77", the date of the second purchase agreement with Marvin Copple (Ex. 7). The amended return for 1979 (Ex. 79) declared the profits on sales of 12 lots as short-term capital gain and listed the "date acquired" as "6/01/79", the date of the third purchase agreement with Marvin Copple (Ex. 9) I conclude that the Respondent caused the person or persons preparing his returns for 1977 and 1979 to rely upon information he provided about lot sales related to the September 8, 1977 and June 1, 1979 purchase agreements as if they were legally binding contracts, without revealing that the actual intent behind those contracts was that no obligation would exist until the subsequent sale to third parties and that profits were to serve as compensation for professional and other services. Further, I conclude that the Respondent knew or should have known that treatment of the sale of the aforementioned lots as capital gains was inconsistent with the true intent of his compensation agreement with Marvin Copple and that he knew or should have known that those preparing his returns and the IRS would rely upon the appearance created by the purchase agreements without knowing that the Respondent and Marvin Copple intended the sale of lots to serve as compensation for services rendered.

83. The loan and mortgage transaction of April 20, 1977 between the Respondent and Commonwealth (Ex. 6) actually did put the Respondent at risk as of that date and actually did create an obligation for full payment of the purchase price of the lots plus interest.

Therefore, when the Respondent declared on his 1977 and 1979 tax returns that the date he acquired certain lots sold in those years was "4/20/77", he accurately reflected the date on which he incurred an actual obligation upon those lots. Because the April 20, 1977 transaction put the Respondent at risk, it is not clear that the Respondent necessarily would still have believed that the proceeds from subsequent sales of the lots were intended as compensation for services rather than gain from capital put at risk. Therefore, I cannot conclude that treatment of the 1977 and 1979 sales of the 26 lots covered by the April 20, 1977 Commonwealth mortgage as capital gains transactions was inconsistent with the true nature of those transactions, as reasonably perceived by the Respondent, or was meant to be deceptive.

84. Treatment of the sale of lots "acquired" September 8, 1977 as short-term capital gain on the Respondent's 1977 federal income tax return had the effect of reducing the amount of taxes owed by the Respondent, compared with the taxes that would have been had the proceeds from sale of those lots been treated as compensation for services or as business income, because, although the tax rates for short-term capital gain and ordinary income were the same, the Respondent was able to offset the short-term capital gain from the sale of lots against long-term capital loss for 1977 and both long-term and short-term capital loss carried over from previous years, with the effect that no tax was paid on the lot sales to the extent of the offset. (T 874-81; Ex. 75) Short-term capital gain treatment of the 1979 sales of lots "acquired" June 1, 1979 on the Respondent's

1979 federal income tax return had no discernible effect on his taxes different than that of treatment as ordinary income, because in 1979 the Respondent had no short-term or long-term loss carryover or net long-term loss to provide an offset (Ex. 79) His 1979 treatment of sale of lots acquired April 20, 1977 as long-term capital gain produced lower taxes in 1979 than would have obtained had he treated the profits as compensation for services, because long-term capital gains are taxed at a lower rate than ordinary income (Ex. 79) However, because of the risk created by the April 20, 1977 transaction, I cannot conclude that characterization of the subsequent sale of lots as capital gain was unreasonable, even though the original intent of the parties was to create a mechanism for compensation of services (Ex. 31, p. 46).

85. Marvin Copple arranged the April 20, 1977 Commonwealth loan and mortgage transaction without prior consultation with Paul Galter and the Respondent, who consented to the arrangement, but who later expressed their dissatisfaction with it. (Ex. 31, pp. 11-12, 632-35, 656-57) The effect of the transaction was to create for the Respondent and Galter an actual obligation for the full purchase price and interest, and to pay Marvin Copple the full purchase price of the 26 lots. Inexplicably, although Copple received the full purchase price for all 26 lots on April 20, 1977, and the Respondent has testified that he received the deeds on that date (Ex. 32, p. 122), the deeds to the Respondent for only 12 of the 26 lots bear that date (Ex. 58).

86. S. E. Copple, president of Commonwealth, previously had agreed that Commonwealth would finance

purchasers of Fox Hollow lots. (T 524) It was a common practice for Commonwealth to make loans to purchasers of Fox Hollow lots upon the authority of Marvin Copple's instructions and without requiring loan applications. (T 528-31, 534-35, 540)

87. The financial effect of the April 20, 1977 loan and mortgage transaction, as concerns Commonwealth and Marvin Copple, was no different than in other instances in which Commonwealth loaned money to purchasers of Fox Hollow lots.

88. After the April 20, 1977 transaction, the Respondent and Paul Galter told Marvin Copple that they did not wish to engage in similar transactions with Commonwealth, but wanted to adhere to the original compensation plan by which Copple would designate lots to be purchased at a discount upon their sale to third parties. (T 636)

89. During 1977, the Respondent and Paul Galter grew dissatisfied with the rate at which Marvin Copple was reselling lots designated on their purchase agreements and with the amount of profits on the sales. (T 656-57)

90. Marvin Copple arranged a transaction by which on December 27, 1977 the Respondent and Paul Galter received \$371,814 in payment for the 40 lots designated on the September 8, 1977 purchase agreement, which had specified a purchase price of \$320,755. (T 657-60) Copple told the Respondent and Paul Galter that he had found a purchaser for the 40 lots but that first the lots would be sold by them to Driscoll, who would share in the profits when she resold them to the ultimate

purchaser. (T 655-57; Ex. 31, pp. 19-21) Payment was by a check drawn against a Commonwealth account in a Lincoln bank and payable to the order of J. A. Driscoll. (T 657-59; Ex. 8) the check was endorsed by Judith Driscoll to P.P.S.S. and was deposited by the Respondent and Galter in their P.P.S.S. bank account, upon which they then wrote a check to Copple for \$320,755. (T 658-60) Copple executed deeds for 30 of the lots to the Respondent, dated December 27, 1977, and the Respondent executed deeds for the same 30 lots to Driscoll, dated December 29, 1977. For an unexplained reason, the Respondent does not appear in the chain of title for the other 10 lots covered by the September 8, 1977 purchase agreement. Instead, Copple deeded the 10 lots directly to Driscoll on January 17, 1978 and Driscoll conveyed the 10 lots to another party on January 18, 1978 (Ex. 58). Although there are general references in the testimony to a Commonwealth loan to Driscoll for the purchase price of the 40 lots and the impeachment decision recites that on December 27, 1977, Driscoll signed a note in the amount of \$371,814 to Commonwealth and executed a mortgage. on the 40 lots in the same amount on the same date, there is no direct evidence in this record of these facts.

91. On July 20, 1979, Judith Driscoll paid the Respondent and Paul Galter \$120,000 for the 12 lots described in the June 1, 1979 purchase agreement (Ex. 79; p. 3) The Respondent and Galter then paid Marvin Copple \$105,600 as required by the June 1 agreement (Ex. 24, p. 44).

92. On August 30, 1979, Judith Driscoll paid \$100,500 to the Respondent by personal check for the

final eight lots remaining of the 26 lots included in the April 20, 1977 Commonwealth mortgage (Ex. 79 and 85), and the proceeds were deposited in the P.P.S.S. account. Also on August 30, 1979, Paul Galter and the Respondent, with a check drawn against the P.P.S.S. account, paid to Commonwealth \$119,273.47, the remaining balance due on the April 20, 1977 note (Ex. 85).

93. At all relevant times, the Respondent knew that Judith Driscoll was Marvin Copple's secretary (Ex. 23, p. 60). At the time of the December 27, 1977 sale of 40 lots to Driscoll, the Respondent might have known that Driscoll had received financing for the purchase of the lots from Commonwealth. But he also might have reasonably assumed that Marvin Copple already had arranged for the sale of the 40 lots to other parties, which is what Copple had told him, that Driscoll was a conduit for the sale, and that Commonwealth was financing the purchase by others of the lots from Driscoll. I am unable to find that the Respondent knew that Driscoll financed any of the lot purchases with loans from Commonwealth. Nothing in the evidence shows any knowledge on the Respondent's part that Commonwealth might suffer as a result of any of the Driscoll transactions. Although the Respondent knew that the check paying for the December 27, 1977 lot transaction was issued by Commonwealth to Driscoll, the record fails to show that the Respondent was then or thereafter aware of circumstances that should have caused him to inquire further as to the source of the purchase money or the propriety of Driscoll's role in the transaction.

94. The "insider borrowing" statutes regulating industrial loan and investment companies in Nebraska, Neb. Rev. Stat. §§ 8-409.01, -.06, became law on August 24, 1979. The only transaction occurring after that date that involved the Respondent and that might have entailed a Commonwealth loan to a director, officer or employee was the August 28 and 30, 1979 sale of eight lots to Judith Driscoll. There are references in the record (but no direct evidence) seeming to indicate that Driscoll financed the purchase with a loan from Commonwealth on August 30, 1979 – after the statute took effect. However, the purchase price was paid to the Respondent with a check drawn on Driscoll's personal checking account, not by means of a Commonwealth check (Ex. 55). There is no evidence that the Respondent knew the source of the funds used by Driscoll or, if he did, that he knew whether the Driscoll loan was obtained in compliance with the procedures required by the new insider borrowing statutes.

95. On December 29, 1973, the Respondent bought a car from Marvin Copple and executed to him an unsecured note for \$6,500. On the same day, Copple assigned the note to Commonwealth. Although the Respondent made some payments of interest on the note, Commonwealth renewed the note periodically and rolled accrued interest into principal upon each renewal, until the note was paid in full on August 30, 1979 (Ex. 3).

96. On August 4, 1976, the Respondent borrowed \$25,000 from Commonwealth for home improvements. At the time of the loan the Respondent executed an unsecured note for the principal amount and signed a

certificate stating that the loan was requested "for business and commercial purposes; and not for personal, family, household or agricultural purposes." The Respondent testified that Commonwealth officials approving the loan knew its actual purpose was repairs to the Respondent's home - there is no evidence that anyone was deceived by the certificate's misstatement of the loan's purpose. Commonwealth periodically renewed the note and rolled accrued interest into principal upon each renewal. In the renewal note dated December 20, 1979, an additional \$3,000 was added to the principal amount of the loan and the Respondent was issued a Commonwealth check for \$3,000 on that date. Interest on the loan fluctuated between 9 percent initially and 20 percent at one point in 1981 (Ex. 4) The Respondent paid Commonwealth the full balance of \$54,048.51 on September 7, 1982, having borrowed \$55,000 for that purpose from First Security Bank & Trust Co. of Beatrice, Nebraska (Exs. 4 and 84). First Security at the time of the \$55,000 loan was controlled by Marvin Copple's son-in-law (Ex. 32, pp. 208-09). Marvin Copple arranged for the loan and, although he did not approve of the First Security loan in advance, the Respondent consented to the arrangement. (Ex. 31, pp. 17-18; Ex. 32, pp. 208-09) The First Security note also was unsecured and the note signed by the Respondent stated that the purpose of the loan was "Bus. Loan". (Ex. 84) The First Security loan was renewed and the interest was rolled into principal (Ex. 84) until the note was paid on November 25, 1983 with the proceeds of a loan from another financial institution (Ex. 31, p. 18; Ex. 32, pp. 202, 210, 212; Ex. 84).

97. Although the Respondent originally had contemplated that Paul Galter would do all legal work for Marvin Copple's real estate development projects and that he would restrict his participation to nonlegal consultation, the work that the Respondent actually did for Marvin Copple included legal advice and negotiations with public officials concerning land use regulations and property interests. For example, the Respondent researched the procedure for gaining city approval for private installation of city utilities by means of executive order and advised Copple and Galter how to use that method. See ¶ 74, *supra*. During the course of his participation in Copple's development projects, the Respondent and Copple had an attorney-client relationship.

98. The attorney-client relationship between the Respondent and Marvin Copple ended when the Respondent stopped working on Copple's real estate development projects. Copple last paid the Respondent for such work on December 27, 1980 (Ex. 18). The Respondent continued to perform work for Copple during a portion of 1981, but after 1981 he performed no work of a legal or business nature. (T 823-25) Therefore, in 1982 and 1983 no attorney-client or business relationship existed between the Respondent and Copple.

99. During 1981 and 1982, Paul Amen, Director of the Nebraska Department of Banking and Finance, came to believe that it was necessary for his department to receive additional legal assistance in handling banking and securities matters within its jurisdiction. (T 282-83) Amen communicated this need to the

Respondent and the Respondent took steps to procure legal assistance for the Banking Department. (T 286-87) An Assistant Attorney General was hired and assigned to the Banking Department in September or early October of 1982, but that person resigned after approximately a week on the job. (T 287-88) In late October or early November of 1982, FBI Agent John Campbell, met with Amen and discussed the FBI's investigation of possible criminal violations involving members of the Copple family, other than Marvin Copple, and the First Security Bank & Trust of Beatrice, whose president was Marvin Copple's son-in-law. (T 266, 306) Campbell told Amen that the Beatrice investigation may spill over to Commonwealth. (T 267, 306) At that time Amen already knew of allegations about insider loans and other insider transactions involving S. E. Copple and Marvin Copple, which were summarized in an examiner's report concerning Commonwealth and dated March 31, 1982. (T 308-09; Ex. 44) After the meeting with Agent Campbell, Amen told the Respondent that there was a serious need for additional legal assistance at the Banking Department and he alluded to the FBI investigation in Beatrice and the possible spill over to Commonwealth as examples of this need. (T 289)

100. In early November, 1982, Robert Kerrey was elected as Governor of the State of Nebraska, defeating the incumbent Charles Thone. Governor Kerrey reappointed Paul Amen as Banking Director (T 289) and appointed William Hoppner as his administrative assistant or chief of staff. (T 118, 479) The new administration announced a freeze on new hiring within the

administrative branch of state government, requiring approval of new hires by the Department of Administrative Services and the Personnel Department. (T 289, 692-93) Amen met with Governor Kerrey and Hoppner and expressed his department's need for an additional attorney whose salary would be paid by the Banking Department but who would be affiliated with the Justice Department. Amen cited the FBI investigation as a reason for his need for another attorney. Hoppner told Amen that he would take care of the matter, but approval from the Governor's office for a new attorney for the Banking Department was not forthcoming for several weeks after Amen's meeting with the Governor and Hoppner. (T 290)

101. During the period that the question of a new attorney remained unresolved, the Justice Department had assigned an Assistant Attorney General to work part time with the Banking Department. (T 437-38, 693)

102. During the period between Agent Campbell's meeting with Paul Amen and March 10, 1983, Barry Lake, Assistant Director and Legal Counsel for the Banking Department, and Agent Campbell had several conversations about information the FBI was developing in its investigation of insider transactions at First Security Bank & Trust and about similar transactions involving Commonwealth. (T 266-70) None of this information concerned Marvin Copple. (T 270) On March 10, 1983, Campbell caused to be sent under his supervisor's signature a letter to Amen to advise him that the FBI possessed evidence of loans at Commonwealth similar to irregular loans at First Security. (Ex. 20) The

letter specifically mentioned one transaction involving a loan in which S. E. Copple received over \$750,000 directly and the person whose name the loan was in received none of the money, but does not mention Marvin Copple. Copies of the letter were sent to the Respondent, the U.S. Attorney for Nebraska, the regional director of the Federal Deposit Insurance Corporation, and Barry Lake. The letter was received at the Justice Department on March 14, 1983. (T 732)

103. Upon receiving the FBI letter, Paul Amen called a meeting between himself, Barry Lake and the Respondent and others in the Respondent's office on March 14, 1983 to discuss the FBI letter. At the meeting Amen discussed his efforts to prevent Commonwealth from becoming insolvent and stated that prosecution of Commonwealth officials would "blow the lid off" of his efforts to rescue Commonwealth and save other financial institutions that might be harmed by the insolvency of Commonwealth. (T 298-99, 322-23) Amen made no request of the Respondent to investigate criminal activity at Commonwealth or to prosecute anyone connected with it. (T 314) Neither did he directly ask that no investigation or prosecution be undertaken. (T 301) Those at the meeting agreed that Barry Lake should contact Agent Campbell. (T 361, 372) At the meeting there was discussion of the transaction mentioned in the letter involving S. E. Copple, but no discussion of any transactions involving Marvin Copple. The Respondent did not disclose at that time his past business and attorney-client relationship with Marvin Copple. (T 301-02)

104. Barry Lake met with Agent Campbell concerning evidence of irregular loans at Commonwealth. (T 363) Campbell declined to show to Lake the depositions and written interviews in his possession, but read portions of them to him, and Lake took several pages of notes. (T 363-65) Lake at that time knew of allegations in the Commonwealth examination report of Marvin Copple's possible illegal receipt of two commissions of \$250,000 each in January and April of 1981, but Lake and Campbell did not discuss those transactions. (T 362, 365)

105. In early May, 1983, Barry Lake sought out the Respondent at the Attorney General's office and told him that there was information about a transaction in which Marvin Copple received \$500,000 from Commonwealth and that it appeared that it might amount to theft of part of that amount. (T 365-67) The Respondent told Lake that he had prosecuted friends before and that if Copple had been involved in a crime he would be prosecuted. (T 336-37) The Respondent told Lake or Lake already knew that he had had business dealings with Marvin Copple, but he gave no details and did not disclose that he had performed work of a legal nature. (T 338-39) The Respondent told Lake to report to him the results of Lake's investigation, but he did not hear from Lake again on that matter. (T 827)

106. It was the policy of Paul Amen and the Banking Department, during late 1982 and 1983 until after the department's seizure of Commonwealth on November 1, to attempt to save Commonwealth for the depositors by obtaining an infusion of capital into the institution and finding a purchase for it before word of

its financial troubles became public. (T 321-22) Amen feared that publicity about insider transactions or financial weakness of Commonwealth could cause a run on its assets and possibly its failure could lead to the downfall of the entire industry. Although Amen never directly told the Respondent that it was the policy of the department to save Commonwealth before pursuing criminal prosecution of its officers, Amen did communicate his concern about the dangers of a public prosecution at the March 14, 1983 meeting and at other times.

107. The course of practice of the Banking Department for procuring prosecution of violations of law within its jurisdiction was to conduct an investigation using department personnel and then to turn over a completed investigation file to either the Attorney General's office or directly to a local county attorney for prosecution. (T 374-76, 497) The Attorney General's office lacked resources to conduct independent investigations of banking and securities laws violations and had to rely on the expertise of the Banking Department's staff of bank examiners. (T 495-97) The Attorney General also could make use of the investigative capacity of the Nebraska State Patrol. (T 496) On matters other than Commonwealth, the Banking Department would take requests for prosecution directly to a local county attorney or would work together with the Attorney General's office and the local county attorney on the prosecution. (T 374-76)

108. In early May 1983 the Respondent assigned Assistant Attorney General Ruth Anne Galter to begin working half-time for the Banking Department in late May 1983 and full time in July 1983. (T 440) Also in

May 1983, the Respondent gave the FBI letter to Ruth Anne Galter to inform her of what matters her potential assignment to the Banking Department might include, but did not ask her to take action concerning it. (T 451-52)

109. Before Ruth Anne Galter accepted the assignment to the Banking Department, she consulted her personal attorney about whether she would have a conflict of interest with her official duties that might include matters involving Commonwealth. Her concern was that her husband, Paul Galter, from whom she was then separated (and has since divorced), had represented Commonwealth. She contacted her husband and was told that he no longer represented Commonwealth and, in fact, had sued Commonwealth on behalf of another client. She disclosed her concern about a conflict of interest to the Respondent and reported to him in a handwritten note dated June 13, 1983 that it appeared no conflict existed. (T 442-45; Ex. 66)

110. In May 1983 Ruth Anne Galter began to become familiar with Banking Department cases in preparation for her assignment, but Commonwealth was not discussed between her and Banking Department officials until after May. (T 440-41) On June 24, 1983, she met with Barry Lake to discuss a number of institutions which the Banking Department was investigating for potential criminal activity. (T 441-42, 444) At that meeting, Lake and Ruth Anne Galter reviewed a memorandum by Lake listing the status of several investigations. (Ex. 60) The typewritten items on Exhibit 60 stated that evidence concerning three of the seven listed investigations was "referred to Attorney

General-Ruth Anne Galter". At the meeting, Lake wrote the word "referred" next to two additional items and also added eighth and ninth items. (T 445-47) The ninth item, in Lake's handwriting, stated, "Commonwealth Sav. Co. - Copples". The memorandum stated as its subject: "Status of Department investigations into potential criminal activities of employees of depository financial institutions under the Department's regulation". Ruth Anne Galter testified that only the two items next to which Lake wrote "referred" were matters on which she subsequently became involved. (T 447) Although she subsequently did some work and sought information concerning Commonwealth matters at Lake's request, Lake did not specifically at that time refer the Commonwealth matter to Ruth Anne Galter. (T 447-48; but see T 370-71, 374) Ruth Anne Galter met with U.S. Attorney Ronald Lahners concerning Commonwealth on June 30, 1983 and scheduled a meeting with Agent Campbell on July 6, 1983 to request evidence from the FBI investigation. (T 448-49) Neither Lahners nor Campbell gave her information that had not been given by Campbell to Lake earlier. (T 448)

111. In June 1983 Ruth Anne Galter conveyed to the Respondent the same general information about possible wrongdoing by Marvin Copple as Barry Lake told him in May 1983. (Ex. 32, p. 292)

112. While she was assigned to the Banking Department, Paul Amen communicated to Ruth Anne Galter the sensitive nature of the Commonwealth matter and the need to prevent information about it from becoming public and Amen and Lake kept her apprised of the Department's efforts to find a buyer and save the

institution. (T 449-50) There is no evidence that Ruth Anne Galter failed to pursue or hampered the investigation of commissions received by Marvin Copple from Commonwealth. (T 379) Because of the Department's focus on saving Commonwealth, Ruth Anne Galter did not conduct any further investigation into criminal violations. Twice before Commonwealth's closing she requested the examination reports, but, though she and Lake looked at one, she never received copies from the Banking Department. (T 456-57) By October 25, 1983, Ruth Anne Galter considered Commonwealth to be among the cases referred to the Attorney General's office. (T 462) She circulated a memo on that date to Paul Amen and the Respondent listing first among "Cases referred to Attorney General" the entry: "1. Commonwealth Savings Company. Preliminary investigation. Need examination report." (Ex. 61) After Commonwealth was seized by the Banking Department she asked to be relieved of Commonwealth responsibilities because she concluded it would be a conflict of interest for her to represent the Department as receiver and also owe that receivership money because of debts she and her husband owed to Commonwealth. (T 454)

113. There is no evidence that the Respondent ever instructed Ruth Anne Galter to either investigate or not investigate Commonwealth criminal activity. Upon her assignment to the Banking Department she received instructions as to her case load and activities from Paul Amen or Barry Lake, although she remained formally under the supervision of the Attorney General. (T 376-77)

114. There was never communicated to the Respondent a formal request that his office undertake an investigation of Commonwealth matters or prosecution of Commonwealth officials until after Commonwealth was closed, when it was requested that his office commence receivership proceedings. (T 697-98) There was some delay in commencement of receivership proceedings because Paul Amen, even after the financial collapse of Commonwealth and its closing, still was attempting to find a buyer.

115. I conclude that, consistent with its policy to save Commonwealth before pursuing prosecution of its officials, the Banking Department retained jurisdiction over the Commonwealth investigation, to the extent that one was conducted before its closing, and never referred the matter to Ruth Anne Galter or the Attorney General's office until shortly before Commonwealth closed.

116. Public prosecution of Marvin Copple during the period before Commonwealth's closing would have violated the Banking Department's policy and would have created the danger of undermining Commonwealth that Paul Amen sought to prevent while he was seeking a buyer for the institution. There is no evidence that a more vigorous investigation, without prosecution, during the period before Commonwealth's closing would have preserved or uncovered any evidence helpful to a subsequent prosecution of Marvin Copple or others related to Commonwealth.

117. Although there is evidence in the record – the deposition testimony of Marvin Copple – to the effect

that the Respondent revealed the FBI letter to Marvin Copple during the spring of 1983 and that he related to him Barry Lake's allegations about theft of Commonwealth funds (T 87-104), I am unable to find by a clear preponderance of the evidence that either actually occurred.

118. The allegations of theft against Marvin Copple involved real estate other than Fox Hollow or Timber Ridge. (Ex. 44) There is no evidence that the Respondent's efforts on Copple's behalf bore any relation to the subject matter of the theft allegations. Nor was the Respondent told anything by Barry Lake or Ruth Anne Galter that might have connected the theft accusation against Marvin Copple with any business or professional dealings between Copple and the Respondent.

119. Although the Respondent retained social contacts with Marvin Copple in 1982 and 1983, he no longer had any business or attorney-client relationship with him after 1981. After September 7, 1982, the Respondent no longer was a debtor of Commonwealth, although he became indebted to First Security, another Copple family institution, when Marvin Copple arranged for transfer of the Respondent's house loan to the Beatrice Bank. He repaid the First Security loan by obtaining a loan from a bank apparently unrelated to the Copple's after he heard rumors that First Security also would collapse, which also was shortly after he received David Domina's initial request for information. (Ex. 32, pp. 202-08)

120. The Respondent reasonably could have perceived that no conflict of interest existed during late

1982 and the portion of 1983 up to the closing of Commonwealth for a combination of reasons: no request had been made for the Attorney General's office to investigate or prosecute Marvin Copple or other Commonwealth officials; the Respondent's business and professional relationship with Marvin Copple had ended at least two years previously; he no longer was in debt to Commonwealth; he knew of no connection between the allegations against Marvin Copple and his own services on behalf of Copple; it reasonably appeared to him that Barry Lake and the Banking Department were carrying out their own investigation of Marvin Copple and Commonwealth; and the Respondent was aware of Paul Amen's apprehensions about the publicity that prosecution would cause before a buyer could be found for Commonwealth.

121. Although the Respondent did not disclose details of his relationship with Marvin Copple to any member of his own office or of the Banking Department or of the Governor's office, the general fact of his past business relationship with Copple was widely known. Barry Lake obviously knew of some type of social or business relationship when he told the Respondent that Marvin Copple was the subject of investigation. At that meeting, the Respondent told Lake that he had done business with Copple. Deputy Attorney General Patrick O'Brien knew of the Respondent's involvement with Marvin Copple and Paul Galter in real estate development as early as 1977. (T 501-02) William Hoppner, Governor Kerrey's top administrative assistant, had known that the Respondent had had an interest in Marvin Copple's Fox Hollow development since the

Respondent contacted him about the Corps of Engineers, flood plain easement when Hoppner worked for Senator Exon. The evidence offers no explanation of how disclosure of the details of the Respondent's relationship with Marvin Copple would have added any material information to the general knowledge of key officials that a business relationship had existed.

122. The Respondent decided to disqualify himself and his office from Commonwealth matters shortly before November 18, 1983, after the Banking Department closed the institution and filed for receivership and after news stories began to appear about the Respondent's dealings with Marvin Copple and Commonwealth. (T 698-700; Ex. 32, pp. 138-39; Ex. 31, pp. 22-23, 81-82) The Respondent denies that he ever had an actual conflict of interest, even at the time of his disqualification, and states that the adverse publicity and its effects on his office were the reason for his decision to disqualify himself. (T 741-50, 756, 828-33)

123. Commonwealth was the only matter on which the Respondent disqualified himself during his career as a prosecutor. (Ex. 30, p. 494)

124. When he took the Respondent's statements on November 30 and December 12, 1983, David Domina already knew from other sources that the Respondent had received compensation for his work on Marvin Copple's real estate development projects; that he had contacts with the Corps of Engineers, the Air Force, and city officials concerning problems with Copple's projects; that he had received profits from sales of lots to

Judith Driscoll; that Driscoll had financed her lot purchases with Commonwealth loans arranged by Marvin Copple; that he had received three loans from Commonwealth and had paid little or no interest until the loans were paid off; that Paul Amen had requested legal assistance and the Respondent had assigned Paul Galter's wife; that the Respondent had received a copy of the FBI letter and had met with Banking Department officials; and other details about the Respondent's involvement with Marvin Copple and Commonwealth. (Exs. 23, 24) Domina learned during his questioning of the Respondent that the Respondent had given capital gains treatment to the profits from lot sales. Other than the fact that the Respondent had received direct payments from Marvin Copple and their amounts, the Respondent withheld nothing of significance from Domina.

ANALYSIS

Overview

In determining whether the conduct of the Respondent violated the oath of office or ethical rules applicable to attorneys licensed to practice law in Nebraska, I must follow the standard of review established by the Supreme Court of Nebraska in previous disciplinary proceedings. Accordingly, the Relator must establish the allegations in the formal charges by a clear preponderance of the evidence, so that I am satisfied to a reasonable certainty that the charges are true. The findings of fact must be sustained by a higher degree of proof than that required in civil actions, yet falling short of the proof required to sustain a conviction in a

criminal action. Also, the presumption of innocence applies, and the charges made against the Respondent must be established by a clear preponderance of the evidence. *State ex rel. Nebraska State Bar Association v. Hollstein*, 202 Neb. 40, 274 N.W.2d 508, 515 (1979).

My findings of fact can be based only on the evidence presented by the parties at the hearing and those matters of which judicial notice appropriately may be taken. This proceeding is the latest in a series of legislative investigations and hearings, impeachment actions, criminal trials, and bar disciplinary hearings, in which testimony and evidence was taken on, among other things, many of the charges made in the present proceeding. However, only excerpts of the testimony from prior proceedings have been introduced here. The present record includes what appears to be all of the testimony of the Respondent before the Special Commonwealth Committee of the Nebraska Legislature, Special Assistant Attorney General David Domina, the Committee on Inquiry of the Nebraska State Bar Association, and the trial court trying charges of perjury and obstruction of justice, as well as his testimony in the present proceeding and excerpts of his deposition. In addition, excerpts of the deposition of Marvin Copple and his testimony at the Respondent's perjury trial were read into the record. As to all other witnesses, the only testimony before me is that given in the referee's hearing.

I am aware that others previously have made findings of fact on many of the same matters now before me. Although the report of the Disciplinary Review Board was forwarded to the Supreme Court with the

formal charges, the report was not offered into evidence at the referee's hearing and I give no consideration to it. The present record does include the decisions of the Supreme Court in the impeachment proceeding and the appeal from the perjury conviction. In reversing the perjury conviction, the Court considered only the legal issue of whether the activity with which Paul Douglas was charged constituted a crime, decided that it did not, and did not reach the question of the sufficiency of the evidence to support the verdict. For that reason, and because neither party has asked that I treat any aspect of the perjury conviction as binding, I give no weight to the fact that a jury has found the Respondent guilty of perjury. Also, even if I thought it appropriate to adhere to the factual findings of the jury in the perjury case, neither the appellate decision nor the present record reveals which of the three allegations of perjury the jury used as the basis of its verdict or whether it found guilt on all three grounds - only two of the three have been charged in the present proceeding. It is possible that the jury based its verdict only on a finding that Paul Douglas lied to the legislative committee when he testified that his actions as Attorney General had not been influenced by his business or personal relationship with Marvin Copple, a matter not charged he

The decision of the Supreme Court in the impeachment matter includes numerous findings of fact related to, among other things, matters charged in this disciplinary action that were made by different groups of judges upon different specifications. On Specification No. 1, which corresponds to Count I here, four judges

found the Respondent guilty, but five votes were required for impeachment. On Specification No. 2, which bears some relationship to ¶8.E. of Count XI, four judges found him not guilty. A unanimous Court found him not guilty of Specifications No. 3 through 6, which are related in various degrees to parts of Count XI. On all specifications except the sixth, the Court made specific findings of fact that, conceivably, could be deemed conclusive upon the same issues of fact presented here. However, neither party in this proceeding pled the impeachment decision as having conclusive effect upon issues here. Instead, in response to questions from the referee during closing arguments, counsel for both parties took the position that the findings set out in the impeachment decision are not determinative in this proceeding. In *DeCosta Sporting Goods, Inc. v. Kirkland*, 210 Neb. 815, 316 N.W.2d 772 (1982), the Court recited the longstanding rule that *res judicata* is an affirmative defense that ordinarily must be pleaded and expanded the rule to allow *res judicata* to be first raised in a motion for summary judgment. In support, the Court quoted language that collateral estoppel may be raised in a pretrial motion to dismiss. The clear corollary of this pleading rule is that a court or referee may not give preclusive effect to former adjudications or to findings of fact made in previous proceedings when neither party has asserted the judgment or findings as having preclusive effect, and, in fact, both parties have denied that they are binding on the present proceeding. Therefore, consistent with my oath, I have exercised my independent judgment in determining the facts, even though my conclusions may run contrary in

some respects to the view previously taken of certain of the facts by a majority of the Supreme Court upon consideration of similar evidence.

As a final preliminary observation, it should be noted that the record includes evidence to which objection was made on the ground that the evidence was not relevant to the formal charges, but which I received with the explanation that the evidence would be given as much or as little weight as it deserved. Although the effect has been to include some irrelevant matters, this approach has allowed me to give careful consideration to the relevance of each piece of evidence and to rely upon or ignore it as seemed appropriate.

Another effect, however, is that the record contains evidence that *appears* to establish an ethical violation with respect to real estate transactions the Respondent now characterizes in such a way that his treatment of them for tax purposes in 1977 and 1979 is inconsistent with his current explanation of the true intent of the parties to the transactions. The lot purchase and resale arrangement, having as its admitted purpose the compensation of the Respondent and Paul Galter for their personal and professional services, would appear to be controlled by I.R.C. §83, as it read in the relevant period. Section 83(a) provides:

If, in connection with the performance of services, property is transferred to any person other than the person for whom services are performed, the excess of –

(1) The fair market value of such property (determined without regard to any restriction other

than a restriction which by its terms will never lapse) at the first time the rights of the person having the beneficial interest in such property are transferable or are not subject to a substantial risk of forfeiture, whichever occurs earlier, over

(2) the amount (if any) paid for such property, shall be included in the gross income of the person who performed such services in the first taxable year in which the rights of the person having the beneficial interest in such property are transferable or are not subject to a substantial risk of forfeiture, whichever is applicable. The preceding sentence shall not apply if such person sells or otherwise disposes of such property in an arm's length transaction before his rights in such property become transferable or not subject to a substantial risk of forfeiture.

The only charge even remotely relevant to this tax matter as an apparent violation of ethical rules against deceit is the subparagraph in Count XI referring to "questionable real estate transfers". However, the full language of that part of Count XI restricts the allegations to questionable activities "for the ostensible purpose of obtaining compensation" for services to Marvin Copple "thereby facilitating the flow of Commonwealth Savings Company funds to Marvin Copple in exchange for title to or a security interest in Fox Hollow lots and compromising his ability to perform the duties of his office" to assist in "the investigation and prosecution of persons, including his client Marvin Copple, who allegedly had engaged in illegal acts" which contributed to the collapse of Commonwealth. Count XI, ¶8.B.

Although the "questionable real estate transfers" referred to in the charge may be the same ones that the Respondent, Paul Galter and Marvin Copple apparently structured in such a way to ostensibly support capital gains treatment on income tax returns (see T 649), despite his intention that the profits from the transfers would serve as compensation for services rendered which should be treated as ordinary income, I am unable to read this charge broadly enough to include the tax matter.

A liberal reading of Count IX, charging that the Respondent lied when he told the Special Commonwealth Committee that he paid income taxes on all payments he received from Marvin Copple, might allow consideration of the tax issue. There is testimony that by treating the profits of lot sales in 1977 as short-term capital gain, the Respondent was able to offset most of the gain with a short-term capital loss carried over from a previous year and thereby avoided paying tax on the gain, to the extent of the offset, that would have been paid had he properly treated the gain as ordinary income. The Respondent had discussed his capital gain treatment of the lot sales when he was interviewed by David Domina and also told Domina that the purpose of the lot transactions was compensation for services. So at the time of his legislative testimony, the Respondent should have been aware that he had not paid taxes on the part of the compensation from Copple that he was able to offset by mischaracterizing it as capital gains. However, at no time during the present hearing did the Relator draw any connection between the evidence on tax treatment of lot profits and Count IX; instead,

Count IX always has been explained in terms of the \$5,000 payment not declared on the 1980 tax return. It would be unfair at this point to read Count IX differently.

I am aware of no authority allowing me or the Court to go beyond the formal charges in finding violations of the oath of office or the Code of Professional Responsibility. As a practical matter, although evidence in the record, some of which is relevant to matters that were charged, appears to show a violation of the Code, it must be recognized that the Respondent resisted consideration of matters not formally charged and made no attempt to rebut evidence that might support a finding of a violation that was not charged. Had the tax matter been charged, it is possible that the Respondent could have offered additional evidence to defeat the charge and show the ethical character of his conduct on that subject.

Count I: Nondisclosure of Direct Payments

The Relator, in Count I, charges that the Respondent violated DR 1-102 when he failed to disclose, during his two sworn statements to David Domina, that he had received a total of \$37,500 from Marvin Copple in compensation and legal fees from 1977 to 1980.

The transcripts of the statements to Domina show, and the Respondent admits, that the Respondent did not at that time tell Domina that he had received direct payments by check for his work for Copple in addition to the compensation paid by means of the discounted

purchase and resale of 78 lots in the Fox Hollow development. However, Domina asked only one question during two questioning sessions that actually called for disclosure of direct compensation for work on the Fox Hollow or Timber Ridge developments. All other questions going to compensation were specifically addressed to projects other than Fox Hollow and Timber Ridge or were restricted in scope to the plan for compensation by purchase and resale of Fox Hollow lots. Each of these other questions were answered within the scope of the questions, but not beyond. The one question Domina asked that was broad enough to encompass direct payments: "With respect to Fox Hollow, then, what was the arrangement for your services as counsel, then?" Ex. 23, p. 19:12-14. An accurate and full answer would have touched on both the lot sale arrangement and direct payments. The Respondent's reply began with a description of the plan for purchase and resale of lots, which chronologically preceded the first of the direct payments, and was accurate in that respect. However, Domina then interrupted and asked a series of follow-up questions addressing the lot transactions, but never took the questioning back to the broader subject of compensation. I conclude from this exchange that the Respondent did not intentionally fail to disclose the direct payments in response to the question about Fox Hollow compensation, but instead was cut off from completing his answer at that point by Domina's narrow follow-up questions.

David Domina's approach to questioning was to ask specific, detailed questions calling for specific answers, rather than to ask for narrative responses to broad

questions. The one time that Domina did ask a question related to compensation that would have afforded the Respondent room to describe both aspects of the compensation arrangements with Marvin Copple, Domina returned to the format of specific questions before the Respondent could move onto the second part of his answer.

The context of the questioning is important. The Respondent had disqualified himself and his office from participation in Commonwealth matters a little more than two weeks after the institution was seized by the state and after press reports publicized his business dealings with Marvin Copple and his involvement with lot sales to Copple's secretary and loans from Commonwealth. The implication suggested by some of the articles, as the Respondent perceived it, was that the Respondent was partially responsible for the collapse of Commonwealth. The Respondent, a Republican, appointed Domina, a Democrat, as Special Assistant Attorney General to handle Commonwealth matters. Domina, within a few days after his appointment, sent a letter to the Respondent requesting detailed information about his personal finances and personal and business dealings with several people connected with Commonwealth, and also asked for his tax returns. Rather than allow the Respondent to submit the requested written response within the specified time, Domina intervened and asked to take a sworn statement less than a week after the letter. The Respondent has testified that before the first statement he had been "warned" by "several people" that Domina was "out to get me." (Ex. 31, p. 99) At the outset of the first

session of questioning, Domina recited to the Respondent the *Miranda* warnings required to be given to criminal suspects being questioned in police custody. To add to the atmosphere, the Lancaster County Attorney was present at both sessions.

The Respondent later testified to the Special Commonwealth Committee of the Nebraska Legislature that during the questioning by Domina he was nervous and felt intimidated and abused. (Ex. 30, p. 441; see also Ex. 31, pp. 148-49) He testified that he "played the part of the lawyer" in answering the questions as asked without volunteering information, such as direct compensation, although he knew that Domina wanted the information. (Ex. 30, p. 442)

Another part of the context of the Respondent's nondisclosure of direct payments to David Domina is that the Respondent at that time "as the elected Attorney General of the State, who had appointed Domina to handle, on the State's behalf, all legal matters involving Commonwealth." [P]ublic officers have been characterized as fiduciaries and trustees charged with honesty and fidelity in administration of their office and execution of their duties." *State v. Douglas*, 217 Neb. 511, 349 N.W.2d 870, 900 (1984) (Hastings, Shanahan and Grant, JJ, and Moran, DJ, dissenting). As the dissent in the impeachment trial pointed out, addressing this same issue, a fiduciary has the duty to disclose to the beneficiary of his trust and confidence all material facts, and failure to do so constitutes fraud, even though absent the fiduciary relationship there would be no duty on the part of one party to a transaction to disclose material facts to the other. *Id.* When a party

has a duty to disclose, nondisclosure constitutes concealment and is as much a fraud as an affirmative false representation. *Id.*

The difficulty on this count is determining whether the Respondent should be held to the duties of his public role at the time of the questioning by Domina or should be afforded the latitude allowed one whose conduct is under investigation and who may be subject to prosecution. If his duties to aid the investigation were paramount at the time of his statements to Domina, the Respondent should have disclosed what he knew Domina wished to know, even if not specifically asked for the information. But if his public role did not control the situation, the Respondent properly could have "played the lawyer" and answered only the questions actually asked.

By the time that he gave sworn statements to Domina, the Respondent had disqualified himself and his office from any participation in legal matters related to Commonwealth and had appointed Domina to represent the State on those matters. With regard to Commonwealth, the Respondent no longer was the State's attorney and no longer had any duties to pursue investigation and prosecution of wrongdoing by Commonwealth officials or others whose illegal activities may have contributed to the institution's troubles. In addition, the Respondent would have been disqualified from pursuing any investigation and prosecution of his own wrongdoing, if any. Therefore, when David Domina recited the *Miranda* warnings and began asking questions about the Respondent's business relationship

with a Commonwealth officer accused of misappropriating funds of the institution, the proper characterization of the Respondent's role in answering characterization of the Respondent's role in answering potentially inculpatory questions was that of a suspect being interviewed by a prosecutor assisting an investigation by another servant of the public interest. In that context, the Respondent cannot appropriately be held to the fiduciary duties he owed the public with respect to matters on which he actively represented the State's interests, and it was legally and ethically permissible for him to answer questions truthfully and completely, within the restraints of the give-and-take of live questioning, without volunteering information not requested.

It is significant that Domina, the Legislature and the public first learned of the direct payments by Marvin Copple to Douglas from the Respondent. In his response to the Miller-Domina report, the Respondent volunteered the information about his receipt of checks for services rendered on the Fox Hollow and Timber Ridge projects and their total amount. His willingness to answer Domina's questions on a range of subjects about his personal finances and relationships and his participation in earlier phases of the State government's response to the unfolding Commonwealth crisis tends to show that he would have discussed with Domina the details of the direct compensation received from Copple, just as he discussed the lot transactions in detail and even went so far as to trace the subsequent transactions involving the lots he had bought from Copple by doing research at the Register of Deeds office in

preparation for the second session of questioning. Also, it is difficult to believe that a man with 20 years of experience in criminal prosecution would have withheld information that was recorded in some form in both his own and Marvin Copple's bank records with an intent to permanently conceal it, especially when he knew Copple was the subject of a criminal investigation into his financial activities.

Taking all of these facts into account, I am unable to find by a clear preponderance of the evidence that the Respondent acted deceptively when he failed to disclose to David Domina in late 1983 the amount of money paid to him directly by Marvin Copple.

*Counts II through VI:
Accountability and Disclosure Omissions*

Counts II and III charge that the Respondent on his 1977 Statement of Financial Interests filed with the Nebraska Accountability and Disclosure Commission pursuant to Neb. Rev. Stat. §49-1493 (Cum. S. pp. 1976) failed to identify Marvin Copple as a creditor to whom \$1,000 or more was owed, despite the alleged debt arising, respectively, from the January 12, 1977 lot purchase agreement for \$241,744 and from the September 8, 1977 lot purchase agreement for \$320,755. Count IV charges Douglas omitted from his 1979 Statement of Financial Interests the name of Marvin Copple as a creditor with respect to the June 1, 1979 lot purchase agreement for \$105,600. Count V charges the Respondent omitted from his Statements of Financial Interests for 1977, 1978 and 1979 the name of Commonwealth as a creditor, although during each of those years he owed Commonwealth \$241,744 plus interest

upon a loan extended April 20, 1977 and periodically renewed until repayment on August 30, 1979. Count VI charges that the Respondent on his 1978, 1979 and 1980 Statements of Financial Interests failed to disclose as additional income of \$1,000 or more payments totalling \$37,500 from Marvin Copple "in connection with the Timber Ridge Real Estate Development for 'legal services' ".

The Nebraska Political Accountability and Disclosure Act requires limited disclosure of the source (but not amount) of income in excess of \$1,000, the nature of services rendered and the identity of creditors (but not amounts owed) to whom more than \$1,000 was owed. Neb. Rev. Stat. §49-1496(2)(b, d) (Cum. Supp. 1976). Limitations upon these reporting requirements are central to Counts II through VI. The limitation on reporting sources of income is as follows:

If income results from employment by, operation of or participation in a proprietorship or partnership or professional corporation or business or nonprofit corporation or other person, the person may list the proprietorship or partnership or professional corporation or business or nonprofit corporation or other person as the source and not the patrons, customers, patients or clients of the proprietorship or partnership or professional corporation or business or nonprofit corporation or other person.

§49-1496(2)(b). The limitation on reporting of creditors is as follows:

Accounts payable, debts arising out of retail installment transactions or from loans made by financial institutions in the ordinary course of business, loans from a relative, and land contracts that have been properly recorded with the county clerk or the register of deeds need not be included.

§49-1496(2) (d).

The Respondent's position is that he was not required to identify Commonwealth as a creditor because all of his loans from Commonwealth, including the April 20, 1977 loan on 26 Fox Hollow lots, were "debts arising . . . from loans made by financial institutions in the ordinary course of business". This exception is set out in the instructions by the Nebraska Accountability and Disclosure Commission for completing the Statement of Financial Interests for 1977, 1978 and 1979. (Exs. 69, 70)

The Act defines financial institution to "mean a bank or banking corporation as defined in §8-101, a federal bank or branch bank, an insurance company providing a loan on an insurance policy, a small loan company, or a state or federal savings and loan association or credit union, the federal government or any political subdivision thereof". §49-1497. Some ambiguity exists as to whether an industrial loan and investment company, such as Commonwealth, is a "financial institution" under the exception to the reporting requirement concerning creditors. Industrial loan and investment companies do not fit the definition of a bank or banking corporation set out in Neb. Rev. Stat. §8-101, and, in fact, are prohibited from engaging in the business of banking by §8-409. The definition of the term "industrial loan and investment company", §8-401(2), appears not to allow it to be deemed a state or federal savings or loan association or credit union. See the definition of "installment investment companies" in C.S. 1929, §81-5101, the precursor to the industrial loan and investment company statutes, excluding building and

loan associations. The term "small loan company" appears in only one other Nebraska statute, §81-8,277, but in a context that does not help resolve the question of what the legislature meant the term to include. The Installment Loan Act, §§45-114 to -155 and 45-173 to -188, has been referred to as the "Small Loan Act". *Albers v. Overland National Bank*, 212 Neb. 578, 324 N.W.2d 396 (1982); Neb. Rev. Stat. §8-817. A federal appellate court has referred to §§45-114 et seq. as applying to "small loan companies". *Fisher v. First National Bank of Omaha*, 548 F.2d 255, 259 (8th Cir. 1977). The Installment Loan or Small Loan Act allows essentially any legal entity to become a licensee for lending money under the terms of the Act and, in §45-119, specifically refers to "licensees that are . . . industrial loan and investment companies".

Thus, it appears that an industrial loan and investment company can be a "small loan company", if it is licensed under the Small Loan Act. However, there is no evidence indicating that Commonwealth had a license under that Act. Thus, a strict reading of the definition of "financial institutions" would yield the conclusion that Commonwealth was not a "financial institution" under §49-1496(2)(d), and Commonwealth should have been identified as a creditor on the Respondent's Statements of Financial Interest for 1977 through 1979.

On the other hand, I am not convinced that an interpretation of "financial institution" requiring cross-comparison of various scattered statutes and case law to resolve a statutory ambiguity is appropriate when testing whether the Respondent's interpretation is

within the bounds of ethical professional conduct. If a strict reading applied, the Respondent would not have been able to accurately answer the question about creditors unless he first engaged in the interpretative analysis set out above and, second, inquired into whether Commonwealth had obtained a license to make loans under the Installment Loan Act. Instead, I believe the Respondent was entitled to make a good faith interpretation of the term "financial institution" as it appeared in the instructions to the Statement of Financial Interests, without being required to go back to the statutory definitions. The legislative history reveals that a purpose for creation of the Nebraska Accountability and Disclosure Commission was to assist office holders and candidates in making the disclosures required of them, rather than leave them to try to interpret disclosure statutes on their own, as they were by prior disclosure law. The Commission did not include in its instructions even the ambiguous definition of "financial institution" contained in the Act. The Respondent cannot be faulted for relying on the instruction and reaching the perfectly reasonable conclusion that an industrial loan and investment company is a "financial institution".

There is no ambiguity about the portion of the statute and the Commission's instructions about the meaning of "loans made by financial institutions in the ordinary course of business". It is clear that the legislature was referring to the financial institution's ordinary course of business in making loans rather than the borrower's ordinary course of business in procuring

loans. The evidence clearly establishes that Commonwealth customarily made loans for the purchase of real estate and specifically had a policy to finance purchases of Fox Hollow lots, and that Commonwealth loan officers customarily extended loans at Marvin Copple's instruction. Thus, objectively, the April 20, 1977 Commonwealth loan to the Respondent was in the ordinary course of business of Commonwealth. Subjectively, there is no evidence that the Respondent had any reason to know at the time of the loan or throughout its pendency that Commonwealth had not made the loan in the ordinary course of business. Either way, the Relator has failed to prove Count V by a clear preponderance of the evidence.

Marvin Copple and his real estate developments were not "financial institutions" under any reasonable sense of the term. The Respondent's explanation for why he was not required to disclose Marvin Copple as a creditor in 1977 because of the January 12 and September 8 lot purchase agreements or in 1979 because of the June 1 purchase agreement is that those agreements did not actually create an obligation to pay anything to Marvin Copple.

On their face, the purchase agreements appear to create a contractual obligation for the Respondent and Paul Galter to pay Marvin Copple the full purchase price upon the sale of the lots, issuance of building permits or expiration of one year from the dates of the agreements. But the actual agreement between the parties to the contract was that no payment was necessary, including the down payment which the contracts recited had been paid but actually had not been, until

Marvin Copple would sell a lot and the new purchaser would pay the money. At that point, according to the oral agreement between the parties and their course of conduct, Copple would deed the lot to the Respondent, the Respondent would sign a deed (prepared by Copple) to the new purchaser, the new purchaser would pay the Respondent, the Respondent would pay Copple the originally agreed-upon purchase price, and the Respondent and Paul Galter would split the profit from the sale. At least this was the procedure that was followed for the 40 lots covered by the September 8, 1977 agreement and the 12 lots under the June 1, 1979 agreement. These 52 lots all were sold to Judith Driscoll in two transactions. The original group of 26 lots were handled differently in that Marvin Copple arranged for Commonwealth to loan to the Respondent the agreed-upon purchase price for the 26 lots in exchange for a note made by the Respondent and guaranteed by Paul Galter and a mortgage. For these lots, Copple received full payment at the time of the loan and the Respondent repaid principal and interest to Commonwealth as Copple sold the lots to third parties, including eight lots sold to Driscoll. Thus, for the 26 lots, there was a real obligation and debt to Commonwealth. But for the 26 lots before the Commonwealth loan and the later groups of 40 lots and 12 lots, no current or binding obligation existed. Although the Commonwealth loan and the sales to Driscoll intervened before the one-year pay back provisions of the lot purchase agreements might have come into effect, there is no evidence to contradict the testimony of the parties to those agreements that the Respondent and Paul Galter would not

have been obligated to pay had the lots not sold and that the parties could have changed the agreements to designate different lots, had they so chosen.

Thus, the agreement between the parties as it actually existed is consistent with the Respondent's position that no reportable debt to Marvin Copple existed with respect to the lots. I do not read the Act to require identification of a seller of property when the obligation to pay for it arises simultaneously with the transfer of title.

Although the Respondent's explanation for not listing Marvin Copple as a creditor is consistent with the actual understanding between the parties to the lot purchase agreements, his tax treatment of sales of the second and third groups of lots contradicts his treatment of them for disclosure purposes. On his return for 1977, the Respondent declared profits from the 40-lot sale as capital gain and listed the acquisition date as September 8, 1977, the date of the nonbinding purchase agreement, rather than December 27, 1977, the date on which the Respondent acquired title and paid the purchase price to Marvin Copple. Similarly, the Respondent declared profits from the 12-lot transaction in 1979 as capital gain and listed the acquisition date as the date of the purchase agreement rather than the date on which the Respondent received deeds and paid the purchase price. Setting aside the question of characterization of profits from the lot transactions as capital gains rather than ordinary income, the acquisition dates listed for the 40 lots and 12 lots would have been proper under the tax laws had the purchase agreements actually been intended to be what they appeared

to be: unconditional real estate sales contracts, if, in addition, the Respondent had taken possession and assumed the burdens and benefits of ownership on the date of the contracts even though deeds and the purchase price were exchanged later. *The Peavey v. United States*, 214 F. Supp. 934 (D. Kan. 1963); *Morrison v. United States*, 449 F. Supp. 654 (1977), 449 F. Supp. 663 (N.D. Ohio 1978); Rev. Rul. 54-607, 1954-2 C.B. 177. However, the testimony of the parties to the purchase agreements establishes that they were not unconditional, as they appeared to be. Instead, they must be seen as either conditional sales contracts, in which the obligation to buy any of the lots listed was conditioned upon Marvin Copple's success in selling those lots to third parties, or as option contracts, in which the buyers obtained a right to purchase certain lots if Copple found third parties to make subsequent purchases but in which there was no obligation to buy even if Copple succeeded in finding subsequent purchasers. Either way, the acquisition date for tax purposes is the date on which the condition upon the purchase obligation is satisfied or on which the option to purchase is exercised, rather than the date of the conditional purchase contract or the date that the option was granted. *Helvering v. San Joaquin Fruit & Inv. Co.*, 297 U.S. 496 (1936); *Milliken v. Commissioner*, 196 F.2d 135 (2d Cir. 1952) (option contract); *Borrelli v. Commissioner*, 41 T.C.M. (P-H) ¶72,178 (1972) (option agreement doesn't affect passage of title or unconditionally obligate owner to execute and deliver deed, so option is merely executory contract); *Vernon Hoven v. U.S. Commissioner*, 56 T.C. 50 (1971) (executory land

contract under which parties were not unconditionally bound and neither title nor possession passed to purchaser upon entry into contract); *Newburg v. Commissioner*, 34 T.C.M. (P-H) ¶65,046 (1965). (conditional purchase contract); Therefore, under the tax law, the Respondent's position as to the true nature of the lot transactions should have required him to designate as the acquisition date the time that he and Marvin Copple exchanged deeds and purchase money rather than when they signed the lot purchase agreements.

The question now is what effect to give to the Respondent's inconsistent treatment of the transactions involving the second and third groups of lots. (His tax treatment of the acquisition date for the first groups of 26 lots is consistent with his position as to disclosure of creditors because for these lots he declared the acquisition date to have been the date of the Commonwealth loan and mortgage rather than the earlier date of the purchase agreement with Marvin Copple.) One option is to find that the Respondent is estopped from taking a position in this proceeding contrary to that taken on his tax return, so that for disclosure purposes the second and third lot purchase agreements would now be treated as unconditional from the date of their execution and the Respondent's failure to list Marvin Copple as a creditor on his 1977 and 1979 Statements of Financial Interests would be in violation of disclosure requirements because he would be deemed to have been indebted to Marvin Copple for the purchase price of the lots from the dates on which he unconditionally contracted to purchase them.

The second option is to find the Respondent's disclosure forms to have been accurately completed in accord with the actual intention of the parties to the lot purchase agreements, and to recognize that the apparent noncompliance with law occurred when he mischaracterized the acquisition dates on his tax returns. Because this second option most accurately reflects the evidence and because the Relator did not assert estoppel, that is the approach I conclude is preferable. Also, it would seem unfair to impose professional sanctions for violation of disclosure laws when disclosure accurately reflected the actual situation but the court assumes the situation to be different than it really is because of an inconsistent position taken in another area. The effect of estoppel would be to manufacture an intent to violate disclosure laws that did not actually exist.

Therefore, the Relator has failed to establish Counts II, III and IV. As discussed later, the charges against the Respondent do not include violation of tax laws or misrepresentations on tax returns. So, although the evidence appears to establish that the Respondent misstated the acquisition dates for 52 lots treated as capital assets on his 1977 and 1979 tax returns, no disciplinary action can appropriately be taken against him on that basis in this proceeding.

Count VI addresses a different portion of the Statements of Financial Interests. The Relator charges that Respondent on his disclosure reports for 1978, 1979 and 1980 failed to report income from Marvin Copple or from the Timber Ridge development. I might note that, contrary to the allegation in Count VI that Marvin

Copple paid the Respondent \$37,500 as consideration for legal services in connection with the Timber Ridge development, the evidence establishes that only the check for \$7,500 dated September 5, 1979 was related to Timber Ridge. The other checks totalling \$30,000 were for work related to the Fox Hollow development.

In the sections of his Statements of Financial Interests asking in 1978 for sources of income more than \$1,000 and in 1979 and 1980 for businesses with which he was associated, the Respondent listed "Foxhollow Development". In 1978 he listed the nature of the Fox Hollow business as "Real Estate" and the nature of services rendered as "Land Development". For 1979 he listed the nature of association as "Owner of certain lots" and in 1980 as "Real Estate Development". In both 1979 and 1980 he listed the nature of the business and the services that he rendered as "Land development. Made judgment decisions and financial investments."³

Like the other charges, Count VI alleges that the actions set out in the charge constitute a violation of the Respondent's oath of office as an attorney and violate DR1-102 of the Code of Professional Responsibility. That provision of the Code deals with violations of

³ Although Exhibit 10 includes what seems to be an amended Statement of Financial Services for 1980 listing Marvin Copple, there is no foundation in the record for this form. Unlike the other statements included in Exhibit 10, this amended 1980 form bears no stamp of receipt by the Nebraska Accountability and Disclosure Commission, nor is it signed. Therefore, I will ignore this portion of Exhibit 10.

disciplinary rules, illegal conduct involving moral turpitude, dishonesty, fraud, deceit, misrepresentation, and any other conduct adversely reflecting on fitness to practice law. I fail to see how any of these characterizations could properly be placed on the Respondent's disclosure of his business associations and sources of income during 1978 through 1980. All but \$7,500 of the \$37,500 referred to in Count VI related to the Respondent's services in connection with the Fox Hollow development of Marvin Copple. Instead of listing the name of the developer, the Respondent listed the name of the development and the address which Marvin Copple used for his real estate development activities. I can see nothing dishonest, deceitful, or otherwise malevolent about listing the development rather than the developer.

Only one of the checks from Copple related to his services on the Timber Ridge development rather than the Fox Hollow development. To be consistent, the Respondent should have listed on his 1979 Statement of Financial Interests the name of Timber Ridge Development or Marvin Copple's name as the developer to whom he rendered services. The Fox Hollow listing in 1979 is accurate because \$5,000 was received during that year for services related to Fox Hollow. The question is whether the omission of the name of Timber Ridge or of Marvin Copple constitutes a violation of the Code. While the omission, strictly speaking, is inaccurate, I believe the purpose of the Act was fulfilled by disclosing involvement with another real estate development of Marvin Copple, listing Copple's business

address, and disclosing in a general way his involvement in land development. I conclude that the omission of Timber Ridge or Marvin Copple from the 1979 statement cannot be characterized by reference to any of the language of DR 1-102.

With respect to Counts II through VI, the Petitioner has failed to establish by a preponderance of the evidence a violation of DR 1-102 of the Code of Professional Responsibility.

Counts VII through IX:

Erroneous Statements to Legislative Committee

Both in his response to the Miller-Domina report, addressed to the Special Counsel of the Special Commonwealth Committee of the Nebraska Legislature, and his subsequent sworn testimony to the Committee, the Respondent stated that he received \$32,500 in direct payments from Marvin Copple for services related to the Fox Hollow and Timber Ridge real estate developments. He also told the Legislative Committee that he had paid income taxes on all income received from Copple. Both of these statements were false. Count VII addresses the statement in the latter to Special Counsel Richard Kopf. Counts VIII and IX address the two statements to the Legislative Committee.

All three counts turn on the Respondent's intent for not disclosing to Kopf, the Committee, and the IRS an additional \$5,000 payment that he received from Copple in 1980. The Relator's position is that the Respondent *knew* about the additional \$5,000 at the time of his

statements to Kopf and the Committee, but intentionally omitted it when he disclosed receipt of the other \$32,500, and that he intentionally misled the Legislature when he testified that he paid taxes on all money received from Copple, though he actually had not reported the additional \$5,000 on his 1980 tax return. The Respondent asserts that omission of the \$5,000 from his tax return was inadvertent and that he relied in good faith on his tax returns when he determined the total compensation received from Copple. Thus, he says, he believed at the time of the letter and legislative testimony that he had received only \$32,500 and had paid taxes on all of it.

The record contains testimony given by the Respondent in several different settings. Exhibits 23 and 24 are his statements to David Domina in late 1983. Exhibit 30 is the transcript of his statement and testimony before the Special Commonwealth Committee of the Legislature on February 25, 1984. Exhibit 31 is the transcript of his testimony before the Committee on Inquiry on August 13, 1984. Exhibit 32 is the transcript of his testimony at his perjury trial in December, 1984. The transcript of the referee's hearing contains both the Respondent's live testimony and excerpts of his deposition taken in October, 1986. In testimony given after the additional \$5,000 became public knowledge in June 1984, his explanation for its omission from his 1980 tax return and for his failure to include it in his testimony before June, 1984 has been consistent. Of course, consistency is no guarantee of the truth of an often-repeated story, but other circumstances either

support his version of events or at least do not contradict it to the point that I can find by a clear preponderance of the evidence that his explanation is not accurate.

The Respondent's accounts of the chain of events leading to omission of the additional \$5,000 from his tax returns and his failure to discover it until after he had testified to the legislative committee can be found in the hearing transcript at pp. 708-11, in Exhibit 31 at pp. 36-40, and in Exhibit 32 at the following pages: 140-44, 163-64, 172-81, 226-35 and 287-89.

In essence the Respondent's story is that he was a sloppy bookkeeper who inadvertently omitted the \$5,000 from the records he kept for preparing his tax returns. He kept relying on those mistaken records and tax returns when he prepared his letter to Special Counsel Kopf and his testimony for the Legislative Committee. He has testified in detail about how he kept track of income and expenses on slips of paper and sheets from yellow note pads, which he put into his personal file. Then, in organizing the materials to be submitted to his accountant for preparing his tax returns, he would go through his personal file and copy the pertinent information onto summary sheets, which he then gave to the accountant. In this process he did not consult his bank account statements or deposit receipts, which he kept in files separate from the personal file referred to above. When questions about his personal finances and business dealings with Marvin Copple began to be raised in the fall of 1983, the Respondent consulted his tax returns to determine the amount of compensation that he received from Copple

on the lot transactions and by direct payments. The tax returns, which were available during the Domina interrogation, showed "Management Fees" totalling \$32,500, but omitted the additional check for \$5,000 in 1980. Had David Domina asked how much he received directly, the Respondent says he would have told him \$32,500 - erroneously, but honestly. Had Domina looked at the Respondent's tax returns during his interrogation, he would have noted this information. When the Respondent prepared the response to the Miller-Domina report, he used the \$32,500 figure from his tax returns, but did not consult his bank records. It was not until about a week after the June 14, 1983 perjury indictment was handed down by a Lancaster County grand jury, when a newspaper article listed checks received from Copple in a greater amount, that the Respondent went beyond his tax returns in trying to determine how much he actually received. This time he looked through his bank records and found a deposit of \$5,000 which corresponded to the check noted in the article. At that point the Respondent filed an amended return for 1980 to declare the additional \$5,000 as well as another \$1,100 that, he maintains, was reimbursement for expenses, but which he acknowledges that he could not document as business expenses. He has testified that his personal file for 1980 does not contain a note of his receipt of \$5,000 from Copple.

If the Respondent's version of these events is true, and Relator produced no contrary evidence, then the Relator has not established the allegation common to Counts VII through IX that the Respondent *knew* his

statements to Kopf and the committee were false at the time that he made them.

The primary objection to the Respondent's story, made by the Relator in this proceeding and by the prosecutor in the perjury trial, is to ask how a lawyer who kept track of deductible expenses as small as \$5 could have forgotten about a compensation check for \$5,000 in a year in which his official salary was \$39,500 and his total adjusted gross income was \$51,635. The Respondent's explanation of his accounting system, which depended upon recording income on slips of paper, supplies a plausible reason why a mental error in not recording receipt of the check at the outset could lead to a self-perpetuating mistake, but does not fully answer why he did not catch the mistake and remember the \$5,000 when he transferred the information from his personal file to the notes supplied to his accountant. The first page of those four pages of notes – the 30th through 33rd pages of Exhibit 82 – shows that he listed as income only "Fox Hollow 12/24/80 - \$15,000.00" and "State of Nebr. - \$39,500". The Respondent states only that he failed to record or remember the check, without explaining how he could have forgotten about that much income merely because it wasn't recorded in his file.

Consideration of the circumstances that might support the Respondent's story must be made in light of the fact that it is the Relator who bears the burden of proof in this proceeding, not the Respondent.

The Respondent received the \$5,000 check more than half a year before he recorded the information in

Exhibit 82 for use by his accountant in preparing his 1980 return. He did declare as income a larger check for \$15,000 received near the end of the taxable year. Both checks were from the same source and were for the same purpose. The Relator has not offered any explanation of why the Respondent might have omitted one check from his tax return intentionally but declared and paid taxes on the other, or why he failed to declare only one check out of five that he received from Copple as compensation for services. If, at the time of preparing his 1980 taxes, the Respondent believed he could get away with failing to declare income from a real estate developer, paid by check and discoverable from both his records and those of the developer, it seems reasonable that he would have had the same belief about the other four checks, one received in that same year, and would have failed to declare them to the IRS as well. There is nothing about this one check for \$5,000 that makes it so different from the other checks that it would be reasonable to assume that the Respondent would have intentionally omitted it from his tax returns while including the others. The only apparent reason for this difference in treatment is that offered by the Respondent: inadvertence and lapse of memory.

If there is no good reason to believe that the Respondent intentionally understated his income when he completed his 1980 return, then the motive imputed to him for lying in 1983 and 1984 about the amount of direct compensation from Copple vanishes. If he did not realize at tax time in 1981 that he was omitting \$5,000 of income, it is likely that he would have relied on his

tax returns as accurate when he set out in late 1983 to pull together information about his dealings with Copple. And, if he lacked the motive of covering up a previous violation of tax law, there is no plausible reason why he would have disclosed to Kopf and the Legislative Committee his receipt of \$32,500 but intentionally omitted an additional \$5,000 from the same source and for the same purpose, assuming that he knew from a source other than his tax returns that he had received the extra amount. If there was any embarrassment about his receipt of money from Copple, certainly receipt of \$37,500 would have been but a little more embarrassing than \$32,500.

It is reasonable that the Respondent, or anyone else seeking to reconstruct financial transactions from several years past, would have relied solely on his tax returns. He has testified, and it is consistent with the deposit slips and bank statements in the record (though it does not include those of the Respondent for 1980 or for the transaction in question), that his deposit slips and bank statements would not have shown the source or purpose of income deposited into his bank account. It seems more natural that one would consult a source where information about income already has been compiled than go through several years worth of bank records to compile the same information again.

I conclude that the Relator has failed to prove that when the Respondent told Special Counsel Kopf and the Special Commonwealth Committee that he had received \$32,500 and that he had paid taxes on all

income from Marvin Copple, he *knew* that those statements were false. Therefore, Counts VII through IX have not been established.

Count X: Felony Perjury Conviction - Dismissed

Count XI: Conflict of Interest

The final count is a cluster of charges orbiting about a central theme of conflict of interest. The individual specific charges are set out as five lettered subparagraphs under Paragraph 8, which asserts that the conduct described in the subcharges made up a "course of conduct violative of DR 1-102".

Subcharge A alleges that the Respondent used his personal contacts with government officials or other prominent persons, developed as a public servant, to perform five specific services beneficial to Marvin Copple in the development of the Fox Hollow and Timber Ridge projects. Subcharge B deals with "questionable real estate transfers and loan activities", but, as discussed previously, is limited in its scope to the idea that the Respondent helped Marvin Copple take advantage of his office in Commonwealth to obtain its funds and that this conduct compromised the Respondent's ability to investigate and prosecute illegal acts that contributed to Commonwealth's collapse. Subcharge C complains that the Respondent failed to disclose "these activities" to the Governor and Banking Director at an appropriate time. Subcharge D alleges that he failed to promptly disqualify himself from handling Commonwealth matters. Subcharge E states that he failed to fully disclose "these matters when requested to do so"

by Special Assistant Attorney General David Domina in late 1983.

My findings of fact relevant to Count XI are loosely organized in the order of the subcharges. I will not extensively reiterate those findings here, but instead will review how the facts relate to the charges and to DR 1-102.

The five numbered descriptions of the Respondent's services to Marvin Copple, listed under Subcharge A, are essentially accurate, and the Respondent has acknowledged as much. The only item not conforming entirely to the evidence is the first, which states that the Respondent expedited condemnation of a sewer easement across adjacent property. Actually, it appears that the Respondent's and Paul Galter's efforts in this regard were superfluous. Although they contacted the city attorney about the matter, they were informed that the city was on the verge of filing the condemnation petition, which was done and the condemnation proceeded without assistance from the Respondent or Galter.

The issue arising from Subcharge A is whether the Relator has established that the Respondent misused the power of his office by taking advantage of his personal contacts developed while he was in public service and, more importantly, whether his conduct violated DR 1-102.

I agree that in performing the listed services for Marvin Copple the Respondent did contact government officials (it is not clear from the evidence what prominent persons other than government officials might

have been contacted in connection with the matters listed under Subcharge A), some of whom he met or worked with during his public service career, which had spanned 20 years before he became involved with real estate development, but others of whom have not been established as "contacts" developed through the Respondent's public role. However, there is no evidence in the record that the Respondent, in dealing with any of these people, ever failed to disclose his private interest in the matters about which he dealt with them or that he ever intentionally caused anyone to believe either that he was speaking as Attorney General rather than as a private citizen or that he would use his position as Attorney General to benefit or punish the person or the governmental entity that the person represented.

The basic problem with the charge is that there was no statutory or ethical rule prohibiting a Nebraska Attorney General from conducting a private law practice or engaging in private business transactions. *State v. Douglas*, 217 Neb. 511, 349 N.W.2d 870, 886 (1984). DR 5-105 provides:

(A) A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of his client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve him in representing differing interests . . .

(B) A lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation

of another client, or if it would be likely to involve him in representing differing interests . . .

EC 8-8 provides, in part, that "[a] lawyer who is a public officer, whether full or part time, should not engage in activities in which his personal or professional interests are or foreseeably may be in conflict with his official duties." DR 8-101(A)(2) provides that "[a] lawyer who holds public office shall not: . . . (2) Use his public position to influence, or attempt to influence, a tribunal to act in favor of himself or of a client."

The Nebraska Supreme Court has found that DR 8-101(A)(2) was not violated when a county attorney obtained from his board of county commissioners approval of his claims for foreclosure fees before the time that a new state statute allowed such claims to be made. It was asserted that the board relied on the county attorney to advise it as to the law, but that he gave erroneous advice because he had negligently failed to inform himself of the provisions of the new law, though he knew a new law on the subject had been passed. The court held:

While it was the duty of the county attorney to advise the county board relative to the law involved, the question is, did he use his influence to get it to violate the law? There is no evidence that the Respondent made any overt attempt to influence the county board to approve his claims for services or used his position as county attorney in any way to persuade or coerce the board to do so. The most that can be said is that the board

assumed that Respondent was acting properly and legally when he filed the claims.

State ex rel. Nebraska State Bar Association v. Holscher, 193 Neb. 729, 230 N.W.2d 75, 80 (1975).

Similarly, there is no evidence that the Respondent here made any "overt attempt to influence" any tribunal or public official by using his public position. In each instance when the Respondent spoke with a public official to try to obtain official action beneficial to Fox Hollow or Timber Ridge, he told the official that he was acting in a private capacity in connection with a private real estate development, according to the testimony of the Respondent, Paul Galter, or both. The Relator has offered no evidence of any contact made by the Respondent with a public official in which the Respondent either told the official or led the official to believe that he was acting in his capacity as the state's Attorney General.

The only evidence tending to show that someone might have believed that the Respondent was acting officially rather than privately is Exhibit 35 and testimony of the Respondent about his receipt of it. Exhibit 35 is a letter signed by Air Force Colonel John R. McKone, Commander of Offutt Air Force Base, and addressed to "The Honorable Paul Douglas/Attorney General/State of Nebraska". The letter was sent to the office of the Department of Justice and opened and stamped along with official mail of the department. In the letter Col. McKone lists several questions about military flights into the Lincoln airport that, he wrote, were posed to the Air Force by "the Honorable Paul

Douglas". The Respondent's explanation of the letter is that he placed a telephone call to an Air Force general he had met at a reception at Offutt, which he had attended as Attorney General. In this conversation the Respondent, according to his testimony, told the general that he was privately involved in a real estate development near the Lincoln airport that was affected by night flights of military planes into and out of the airport. He asked questions about plans to continue the flights and the general said that he would have to get back to him. The response came in the form of the letter from Colonel McKone.

There is no testimony from either Colonel McKone or the unidentified general to contradict the Respondent's version of the event. As such, I find it reasonable to believe that the Respondent did disclose his private interest, but that this information was lost as the inquiry was passed down the military chain of command. Colonel McKone's assumption that an inquiry from Paul Douglas should be answered with a letter addressed to the Nebraska Attorney General, standing alone, falls far short of establishing an overt attempt by the Respondent to obtain information from the Air Force by using the influence of his office.

Also, I can discern nothing about the circumstances as they appeared in 1976 through 1980 that should have alerted the Respondent then to the possibility that his involvement with Marvin Copple might lead to a conflict with his public duties later or that his public duties already were in conflict with the interests of his new client, Copple. There is no evidence that anyone in

State or Federal government suspected Commonwealth officials of wrongdoing during this period.

Subcharge B presents a more complex tangle of issues. Foremost is the critical question of what it means. Had the Relator ended the charge at the end of the second line – “Engaged in questionable real estate transfer and loan activities with Marvin Copple, Judith Driscoll and Commonwealth Savings Company.” – there might have been room to stretch the truncated charge to encompass the implication that the Respondent deceptively participated in structuring the Fox Hollow compensation plan in such a way as to support the capital gains treatment he ultimately gave the lot transactions in spite of his intention that profits from the lots serve as his compensation for services rendered.

However, Subcharge B goes on to include a string of clauses serving to severely restrict the scope of the charge. As it is written, I can only read it to allege that the questionable transfers and activities deceptively gave the impression of having a purpose of compensating the Respondent for services, but actually were a means for helping Marvin Copple obtain Commonwealth funds in exchange for an interest in Fox Hollow lots and had the effect of harming the public interest by compromising the Respondent's ability to investigate and prosecute illegal acts involved in the collapse of Commonwealth. Put more succinctly, Subcharge B is about aiding insider transactions and creating a conflict between public interest and private interest.

To initiate a disciplinary proceeding in the Supreme Court, the Relator is to file a verified formal charge "setting forth the grounds thereof with reasonable definiteness". Disciplinary Rule 10. The Court has interpreted this language to mean that the grounds must be set out "with sufficient definiteness so the Court may be advised of the matters complained of and the attorney fully informed of the matters with which he is charged so as to enable him to prepare and present his defense thereto". *State ex rel. Nebraska State Bar Association v. Fisher*, 170 Neb. 483, 103 N.W.2d 325, 329 (1960). The Court went on to say, "In a disciplinary proceeding only those matters which are specifically charged in the complaint can be considered". The Court also has said:

Although only those matters which are specifically charged in the complaint in a disbarment proceeding can be considered, a disciplinary proceeding is not a lawsuit with formalities of pleading, nor can technicalities be invoked to defeat the charges where undisputed facts show conduct which is ethically wrong.

State ex rel. Nebraska State Bar Association v. Leonard, 212 Neb. 379, 322 N.W.2d 794, 796 (1982); *State ex rel. Nebraska State Bar Association v. Jensen*, 171 Neb. 1, 105 N.W.2d 459, 465-66 (1960). In *Leonard* the Court imposed suspension on the basis of violation of a federal regulation, even though the attorney had been charged instead with conviction of a federal statute found by the Court to have been a void ex post facto

law. The Court explained that even though the conviction was void, in a disciplinary proceeding the attorney's conduct is in issue rather than whether he was technically guilty of the crime charged. "An attorney may be subjected to disciplinary action for conduct outside the practice of law for which no criminal prosecution has been instituted or conviction had." 322 N.W.2d at 796. The void statute, which was charged, addressed the same conduct as the regulation, which was not charged. But the conduct itself was charged, and the attorney was aware of the regulation.

Leonard illustrates what appears to be a narrow exception to the rule that only those matters specifically charged can be considered. As long as the conduct proscribed by two different criminal laws or ethical rules has been charged, it does not violate due process to find that the conduct violates a law or rule not specifically included in the charge, even though the law or rule that was included in the charge is not found to be a basis for discipline.

Leonard does not apply to the present problem. The ethical rule cited in connection with Subcharge B adequately covers the apparent mischaracterization of income for tax purposes, but neither Subcharge B nor any other charge describes that particular behavior. *Leonard* allows the fact finder to switch reasons why behavior is unethical, but does not allow discipline to be based on behavior not specifically charged.

Taking Subcharge B as it is written, I am not convinced by a clear preponderance of the evidence that the Respondent knowingly participated in insider

transactions to benefit Marvin Copple. The real estate transactions may have been questionable from a tax perspective, a matter not charged, but they and the Commonwealth loans have not been shown to have been questionable or improper from the Respondent's point of view.

The compensation arrangement involving discounted conditional purchase contracts and resale to third parties had as its actual, not merely ostensible, purpose the compensation of the Respondent and Paul Galter for their services. Although early press accounts of large profits from one-day sales and resales may have created a public perception that Commonwealth money was illicitly siphoned from the institution and funneled to one of its officers and the Attorney General, the evidence in this case portrays at least the Respondent and Galter in a much more favorable light. Rather than take unexplainable quick profits, they worked part time for a number of years on many aspects of the real estate development process. Although not always successful, their efforts benefited Marvin Copple and Commonwealth by enabling Copple to clear the way for opening the three Fox Hollow additions for the sale of lots, which allowed Commonwealth to make purchase money loans to lot buyers and builders and collect the interest.

When lots sold to third parties, Marvin Copple received the discounted purchase price and gave up title. Even though in most instances the ultimate source for the money to purchase the lots was Commonwealth, Marvin Copple received less than the lots were worth at that time because of the discount given the

Respondent and Galter, though he still apparently took a profit above what the lots cost him to buy and develop. As such, it can hardly be contended that the lot sales were sham transactions for the benefit of Copple.

The April 20, 1977 loan/mortgage involving the first group of 26 lots also had the effect of putting into Marvin Copple's hands less than what the parties perceived to be the fair market value of the lots in exchange for conveyance of title and, in addition, created for the Respondent and Galter an enforceable obligation to Commonwealth for both principal and interest. Commonwealth ordinarily financed the purchase of Fox Hollow lots from Marvin Copple – the April 20 transaction was no different in its economic effects. As the lots sold to others, the Respondent made payments of principal and interest to Commonwealth and made the final payment in late August 1979.

When Judith Driscoll bought 40 lots at one time in late 1977, the Respondent knew that she was Marvin Copple's secretary and knew that the transaction was occurring after he and Paul Galter complained to Copple that the first batch of 26 lots, on which they were indebted and on which interest was accruing, was selling too slowly and bringing in too little money. The Respondent also knew at the time that Driscoll paid for the lots with a check on Commonwealth's account that was made out to her and that she endorsed to the Respondent's partnership account. These facts, plus the notation "Ln." on the check, have been the focus of the allegation that the Respondent knew that Driscoll

obtained a loan from Commonwealth to pay for the purchase.

The Respondent's version of the 40-lot transaction is plausible and is not contradicted by evidence other than the circumstantial evidenced summarized above. He has testified that Marvin Copple told him and Galter that he had found a buyer for the 40 lots and was including Driscoll as an intermediary so that she could share in the profits. Paul Galter gave much the same version. Given this representation about a subsequent buyer, there would be no reason for the Respondent to be suspicious of the source of Driscoll's purchase money, even though it was paid with a Commonwealth check. Nothing about the transaction would have raised any suspicion that Marvin Copple would share in the proceeds of the sale beyond the discounted purchase price paid under the September 8 contract.

The December 27, 1977 transaction did have the effect of transferring Commonwealth money to Marvin Copple in exchange for a security interest given by his secretary. But I conclude that the Respondent did not know that Commonwealth had financed Driscoll, because he reasonably believed Copple's statement that another buyer was ready to purchase the lots from Driscoll. As far as was known to the Respondent, this transaction had the same economic effect as the other lot sales: Marvin Copple received less than full market value in exchange for title to his lots.

The two subsequent lot purchases by Driscoll would have provided the Respondent with even less indication

of Commonwealth involvement. The two 1979 purchases were made with checks written on Driscoll's personal account at a different institution. Again, from the Respondent's perspective, Copple received discounted value for signing over his lots. There is no evidence that the Respondent knew of any loans by Commonwealth to Driscoll or any kickbacks of excess loan proceeds from Driscoll to Copple, if, in fact, there were any. On all three of the Driscoll transactions, there is no evidence that the Respondent knew or should have suspected that Commonwealth might be hurt because of an inside agreement that Driscoll actually was not obligated on the purchase money loans.

The two Commonwealth loans for home repairs and purchase of a car from Marvin Copple had questionable features, in that both were renewed repeatedly over the course of several years with no collateral and no payment of interest, except that the interest accrued up to the renewal date would be added to the principal of the renewed notes. There was testimony by minor Commonwealth officers that renewals and rollover of interest were ordinary occurrences at Commonwealth for real estate builders and developers, but they did not indicate that it was normal to accommodate in this way persons borrowing money for personal reasons. Related is the fact that on the day the Respondent obtained the home repair loan, he signed a certificate that the loan was requested "for business and commercial purposes; and not for personal, family, household or agricultural purposes". (Ex. 4)

The home and car loans present the same problem as did the issue of tax treatment of lot sales: no charge

is broad enough to fairly allow disciplinary sanctions to be imposed.⁴ Again, the charge closest on point is Subcharge B, but it is limited in scope to aiding insider transactions and the subsequent effect on the Respondent's public duties. The car loan was put on Commonwealth's books when Marvin Copple assigned to Commonwealth the note made by the Respondent to Copple personally. Copple had received what the evidence indicates was a promissory note for the fair market value of the automobile that he sold to the Respondent. Copple then obtained from Commonwealth the value of the note. No excess value went from Commonwealth to Copple. The home repair loan involved no money being paid to Marvin Copple at all.

Overlooking the limitation of the charges for a moment, I am not convinced that discipline would be appropriate with respect to the car and home loans in any event. Although both were rolled over for a number of years, there is no evidence that Commonwealth and the Respondent had any secret understanding that he would not actually be obliged on the notes. Instead, the car loan was fully paid off, with all accrued interest, in 1979 after the Respondent received profits from lot sales, and the home loan and interest were fully paid in

⁴ Although the same problem exists, the Respondent and his attorneys reacted differently at trial toward evidence concerning the car and home loans than they did toward attempts to introduce evidence of tax matters. Evidence of the latter was consistently met with the objection that it was not relevant to any charge. By contrast, the Respondent testified about the home improvement loan on cross-examination without objection. (T 804-09)

1982 with the proceeds of a loan from another institution. Additionally, the interest on the house loan ranged as high as 20 percent during one renewal period — not exactly a sign of a sweetheart loan to a public figure.

The only aspect of the Respondent's loans with Commonwealth that I might view as an appropriate basis for sanctions would be the false certificate as to the purpose of the home loan. Although there is no evidence that the certificate actually was relied on by anyone to their detriment, an attorney should realize that a financial institution's request for a certificate of a loan's purpose at the time that the loan is made ought not to be treated as a frivolous requirement and instead ought to be answered truthfully. Obviously, the Respondent must have known that home repairs to his personal residence are not of a "business and commercial" nature, even though it was equally obvious to him that those making the loan knew its actual purpose.

Although I cannot affirmatively exonerate the Respondent of wrongdoing with respect to conduct that might have fit Subcharge B had it been written more broadly, I also cannot find that the Relator has proved the charge, as written, by a clear preponderance of the evidence.

The view I have taken of the adequacy of proof and pleadings of Subcharges A and B does not narrow the inquiry under Subcharge C, merely because C hinges on the term "these activities", an apparent reference to the activities described in A and encompassed within B. It is possible that a duty to disclose a relationship will

arise from public office even though nothing about the relationship was illegal or unethical. Subcharge A raised the question of conflict between then-current public duties and the interests of a private client, or concurrent multiple representation. Subcharges C and D raise the different issue of conflict between current public duties and a past private relationship.

In rejecting an appeal from denial of a motion to disqualify an attorney representing a plaintiff in a civil suit, the Court has discussed at length the question of current employment conflicting with the interests of a former client:

It is a rigid rule necessary to be strictly observed and religiously enforced that when an attorney has once been retained and received the confidence of a client, he may not accept and receive a retainer from or enter the service of another whose interest is adverse to his client in the same controversy or in a matter so closely related thereto as to be in fact a part thereof. It is an inherent virtue of the profession of law that its fidelity to its client can safely be assumed. Any member who proves false to this and places himself in a position to betray any information or facts obtained while employed on one side is guilty of the grossest breach of trust. The lawyer must in all things be true to the trust accepted when he was received into the profession or failing it he must leave the profession or be promptly separated from it. *Zimmer v. Gudmundsen*, 142 Neb. 260, 5 N.W.2d 707; *State ex rel. Nebraska State Bar Association v. Price*, 144 Neb. 542, 13 N.W.2d 714.

The fact that an attorney was incidentally connected with an adverse interest does not of itself disqualify him. He may act for a new client if his interest is not necessarily adverse to those of the former client, and if the attorney is not called upon to use or take advantage of the confidential communications of the former client for the benefit of the new one. The test of inconsistency is not whether the attorney has ever been retained by the party against whom he proposes to appear, but whether the acceptance of a new retainer will make it necessary or convenient in advancing the cause of his new client to do anything which will injuriously affect his former client, and whether he will be obligated in the new relationship to use against his first client information received because of the former employment. An attorney is not barred from representing a subsequent client against a former client where the duties required of him do not conflict with those involved in the former employment.

Adams v. Adams, 156 Neb. 778, 58 N.W.2d 172, 182 (1953); *see also Bellairs v. Dudden*, 194 Neb. 5, 230 N.W.2d 92, 96 (1975).

A related rule, dealing with the effect of private interests of the lawyer upon his representation of a current client, is DR 5-101(A):

Except with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected

by his own financial, business, property, or personal interest.

Thus there are two critical, separate questions arising under Subcharges C and D. First, would representation of the state in investigation and prosecution of Marvin Copple involve the "same controversy" or "a matter so closely related thereto as to be in fact a part thereof," so that it would be "necessary or convenient in advancing the cause of [the state] to do anything which will injuriously affect his former client", Copple, or so that the Respondent would "be obligated" when acting as Attorney General on matters involving Copple "to use against his first client information received because of the former employment"? Second, would the Respondent's exercise of professional judgment on behalf of the State be affected by his past or current relationship, whether of a professional, business or financial nature, with Copple or Commonwealth?

In the impeachment decision, the Supreme Court stated rules more closely tailored to the situation:

We believe that the Attorney General had the duty of serving the public with undivided loyalty, uninfluenced in his official actions by any private interest or motive whatsoever. As stated by Chief Justice Vanderbilt of the Supreme Court of New Jersey, in *Driscoll v. Burlington-Bristol Bridge Co.*, 8 N.J. 433, 474-76, 86 A.2d 201, 221-22 (1952):

They [public officers] stand in a fiduciary relationship to the people whom they have been elected or appointed to serve As fiduciaries and trustees of the public weal they are

under an inescapable obligation to serve the public with the highest fidelity. In discharging the duties of their office they are required to display such intelligence and skill as they are capable of, to be diligent and conscientious, to exercise their discretion not arbitrarily but reasonably, and above all to display good faith, honesty and integrity They must be impervious to corrupting influences and they must transact their business frankly and openly in the light of public scrutiny so that the public may know and be able to judge them and their work fairly These obligations are not mere theoretical concepts of idealistic abstractions of no practical force and effect; they are obligations imposed by the common law on public officers and assumed by them as a matter of law upon their entering public office.

In *Copple v. City of Lincoln*, 202 Neb. 152, 167, 274 N.W.2d 520, 528 (1979), this court cited the following language from another New Jersey case: " 'The decision as to whether a particular interest is sufficient to disqualify is necessarily a factual one and depends on the circumstances of the particular case.' "

State v. Douglas, 217 Neb. 511, 349 N.W.2d 870, 885-86 (1984). More specifically, the Court said:

The defendant in this case was employed by the State of Nebraska before, during, and after his extracurricular dealings. There were no statutory provisions precluding outside employment on the

part of the Attorney General in effect at the time. By case law, a public officer is not necessarily required to give every instant of his time to the public service in such a sense that he cannot, if wholly consistent with public duties, perform any other service or earn money from any other source. *State v. Hinshaw*, 197 Iowa 1265, 198 N.W. 634 (1924). Nevertheless, we believe that Douglas had a duty to avoid entanglements which potentially could cause a division of his loyalties. Because he did not choose to do so, we must examine his personal situation as of the spring of 1983.

Id., 349 N.W.2d at 886.

While, as discussed previously, I am not bound by the factual determinations of the Court in the impeachment case, even those stated unanimously, I find, applying the clear preponderance standard rather than the reasonable doubt standard applicable to the impeachment, that the Court's conclusions in rejecting the disqualification specification are fully applicable to the present evidence:

The defendant had engaged in a series of intricate real estate dealings with Marvin Copple, commencing in about 1977. These are set forth in considerable detail in other portions of this opinion. The conclusion of those transactions occurred on July 20, 1979, when Marvin Copple was paid for the last of the lots purchased by Douglas and Galter.

In addition, the defendant did certain other work for Marvin Copple, during the years 1978,

1979, and 1980, for which he was paid the sum of \$32,500. Altogether, Douglas devoted approximately 1,500 hours to his dealings with Copple.

During this same period of time, the defendant had made several loans with Commonwealth. With the payoff of the final loan in the amount of \$54,048.51 on September 7, 1982, his business relations with that institution apparently ceased. However, the source of funds used to repay that loan was a \$55,000 loan from First Security Bank & Trust Co. of Beatrice, Nebraska, an institution with a management familial relationship with Commonwealth. That loan was paid in full on November 25, 1983.

As nearly as can be determined from the record, no business relationship existed between Douglas on the one hand and Copple and Commonwealth on the other hand as of March 14, 1983. Therefore, it cannot be said that Douglas was at that point actively representing interests which conflicted with those of the State.

The State would seem to argue, however, that the defendant's enthusiasm for investigation of, and judgment as to possible prosecution for, insider loans to Marvin Copple might very well be dimmed by the fact that the defendant's own personal interests and conduct may have been a link in the chain of alleged illegal activities. Certainly, such thoughts have occurred to a number of people.

However, there is no evidence that Douglas acted in the discharge of the responsibilities of his office any differently than he would have, had the

unfortunate prior dealings never occurred. According to the practices and procedures of that office, the Department of Banking and Finance would have remained primarily obligated to investigate the condition of Commonwealth and other financial institutions. An assistant attorney general would have been assigned full time for the general investigative and legal work required by the Department of Banking and Finance. That assistant attorney general would have been directed by the Department of Banking and Finance and would have been directly responsible to Deputy Attorney General Gerald Vitamvas. That is exactly how this case was handled; and the work performed by the assistant attorney general assigned to the Department of Banking and Finance to investigate many financial institutions, including Commonwealth, was done in a professional manner and was thoroughly acceptable to the department.

The Attorney General did have the appearance of possessing a conflict of interest, and normally should have made a full public disclosure. However, when one considers that the Department of Banking and Finance was interested in avoiding prosecution, if possible, and even in avoiding adverse publicity so as not to cause the "house of cards" to come tumbling down, the defendant's reticence to "rock the boat" is understandable.

Id., 349 N.W.2d at 886-87.

The charge before the Court in the impeachment trial specified that there was a "previous business relationship" between Douglas, Copple and Commonwealth. The present evidence establishes that there also was some form of attorney-client relationship between the Respondent and Marvin Copple, though never one between the Respondent and Commonwealth. A prior or current business or personal relationship between a public official or attorney and a person other than his client triggers an inquiry into the effects of the relationship upon the current professional representation, which was the focus of the quoted excerpts from the impeachment decision. When the current representation puts the attorney in an adverse position to a former legal client, the focus is on the effect of the current representation on the interests of the former client.

Applying the *Adams* test of inconsistency, I find that the Relator has failed to prove that during the time leading up to the collapse of Commonwealth the Respondent was ever on notice that his role as Attorney General would involve his representation of state interests adverse to those of his former client "in the same controversy or in a matter so closely related thereto as to be in fact a part thereof". The Banking Director in late 1982 asked for help in obtaining more legal assistance by telling the Respondent that the investigation of a Copple institution in Beatrice might spill over to Commonwealth, but did not specifically refer to accusations against Marvin Copple. The March 10, 1983 letter from the FBI referred to transactions at Commonwealth involving S. E. Copple, but did not mention

Marvin Copple. The first time the Respondent was informed of accusations against Marvin Copple was in May 1983 when Barry Lake told him generally about \$500,000 of commissions possibly obtained illegally from Commonwealth. Lake did not specify which real estate the commissions related to, but the amount and the fact that it was a commission does not bear any resemblance to any transactions the evidence shows the Respondent to have been involved in on Copple's behalf. The evidence fails to show that the Respondent was given any more details about the accusations against Marvin Copple through the summer and fall of 1983. The Relator has failed to show that the alleged crimes the Respondent might have been asked to prosecute Marvin Copple for bore any relation to the work the Respondent did for Copple.

The Respondent's legal representation of Copple, to the extent that such existed, certainly ended by sometime in 1981, as were their business dealings. It is not enough to show merely that two years or more later the Respondent was an ex-attorney and former employee or business partner of a criminal suspect whose prosecution might come under the Respondent's authority.

Similarly, the Relator has not shown that the time was ripe between late 1982 and November 1, 1983 for the Respondent to engage in a self-analysis of whether he had a conflict of interest involving Marvin Copple. Everything about the Commonwealth matter made known to the Respondent during this period pointed to the Banking Department as the agency then responsible for investigating violations of banking laws at

Commonwealth. Although the Assistant Attorney General assigned to the Banking Department was kept informed about the progress of attempts to sell Commonwealth and was given instructions on occasion to gather certain information relevant to criminal activity by Commonwealth officers, she was not given the degree of control over the Commonwealth file that she had on other files that had been specifically referred to her and the Justice Department. There is no evidence that the Respondent even knew of the limited extent to which Mrs. Galter had become involved with Commonwealth matters, although he had expected that that would be part of her assignment.

As long as the investigation reasonably appeared to reside in the Banking Department, and the Director of that Department was carrying out his policy (known to the Respondent) of trying to sell Commonwealth before pursuing prosecution of its officers, the Respondent had no reason to determine whether he had a conflict of interest or to disclose information relevant to that question or to disqualify himself from an investigation for which his office had no responsibility yet.

My examination of the evidence leads me to the conclusion that the Respondent is correct when he states that he still does not believe that he had a conflict of interest in 1983 leading up to the collapse. And he may be right in asserting that he did not have an actual conflict of interest after the collapse and would have been an appropriate person to have prosecuted Marvin Copple. Either way, when Commonwealth collapsed and public attention turned to the past relationship between the Attorney General and a

key figure in Commonwealth, an appearance of impropriety was widely perceived, whether or not it arose from the true facts of the situation or from distorted news reporting. At that time, within three weeks of the collapse, the Respondent announced his disqualification. I am unable to find that this series of events, viewed in its full context, establishes a violation of the Code of Professional Responsibility.

Subcharge E alleges that the Respondent did not disclose "these matters" fully to David Domina "when requested to do so". My factual findings concerning the Respondent's knowledge about Commonwealth loans to Judith Driscoll, the matters that he did disclose, and Domina's failure to ask the appropriate follow-up questions about direct compensation dispose of this charge.

CONCLUSION

My conclusion that the Respondent has not violated his oath of office as an attorney or the provisions of the Code of Professional Responsibility is based on a combination of factors: the failure to charge violations that appeared to have support in the evidence, the absence of proof of essential elements of those charges that were filed, and choices I made on certain issues to believe the Respondent's version of events in preference to evidence having less credibility or to inferences of impropriety that seemed not to be supported by all of the relevant evidence.

I recognize that the Court or others reviewing the evidence may make different choices as to who to

believe and how much weight to give to certain critical evidence. In that light I briefly mention the disciplinary sanctions I would have recommended had I made different choices and found one or more ethical violations to have been established.

With one exception, I did not find any conduct of the Respondent, if the contradictory evidence were viewed least favorably to him, to have been serious enough to warrant more stringent discipline than suspension for the two years he already has spent separated from his livelihood, the profession of law. The exception is that had I believed the deposition testimony of Marvin Copple that the Respondent showed him the March 10, 1983 letter from the FBI and told him about Barry Lake's statement that Copple was under investigation for theft from Commonwealth, and if I could find a charge that fairly describes this behavior, I would have recommended disbarment.

Marvin Copple did not appear at the hearing and I had no opportunity to view the witness and judge his credibility. I felt comfortable believing the testimony of the Respondent as to this matter.

BY THE REFEREE:

/s/ Thomas R. Burke
Thomas R. Burke

January 23, 1987

(Caption Omitted in Printing)

REPORT OF THE DISCIPLINARY REVIEW BOARD
COMPLAINT

(Filed July 8, 1985)

Paul L. Douglas is a member of the Nebraska State Bar Association and was the duly elected Attorney General of the State of Nebraska from the time he took office in 1975 to his resignation in 1984. This matter originated with the filing of a complaint by the Counsel for Discipline of the Nebraska State Bar Association on November 23, 1983. The Committee on Inquiry, District Two, heard the complaint on August 13 and 14, 1984, pursuant to an order of the Disciplinary Review Board dated May 10, 1984. That Committee made its report and filed Formal Charges against Mr. Douglas on September 17, 1984.

FACTS AND DISCUSSION

The formal charges against Mr. Douglas consist of six counts. These charges flow from the collapse of the Commonwealth Savings Company in Lincoln, Nebraska, and the subsequent investigation of that collapse. The six counts fall into three categories: (1) failure to disclose compensation received to Special Assistant Attorney General David A. Domina, who was investigating the Commonwealth collapse; (2) failure to disclose debts in excess of \$1,000.00 or more as

required by law under the Nebraska Political Accountability and Disclosure Act; and (3) failure to report the source of income in excess of \$1,000.00 in the Statement of Financial Interests required by law and filed by Mr. Douglas for 1978, 1979 and 1980. This first category deals with Count 1; the second category includes Counts II, III, IV, and V; and the third category refers to Count VI.

The Counsel for Discipline alleged the facts showed a violation of Disciplinary Rule 1-102 of the Code of Professional Responsibility:

"DR 1-102 Misconduct

"(A) A lawyer shall not:

- (1) Violate a Disciplinary Rule.
- (2) Circumvent a Disciplinary Rule through actions of another.
- (3) Engage in illegal conduct involving moral turpitude.
- (4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.
- (5) Engage in conduct that is prejudicial to the administration of justice.
- (6) Engage in any other conduct that adversely reflects on his fitness to practice law."

This very general prohibition overlaps with other provisions of the Code that prohibit misrepresentation in specific contexts, such as DR 7-102, DR 7-106 and DR

7-109, which prohibit falsification, obstruction or concealment of evidence and DR 7-102(A) (5), which requires truthfulness in statements to third parties.

We believe Canon 9 is also relevant:

"A Lawyer Should Avoid Even the Appearance of Professional Impropriety."

COUNT I

Count I alleges that Mr. Douglas knowingly failed to disclosed compensation received from Marvin E. Copple in the amount of \$37,500.00 to Mr. Domina in sworn statements given November 30, 1983, and December 12, 1983. The count further states that this non-disclosure violates Mr. Douglas' Oath of Office as an attorney licensed to practice law in the State of Nebraska, and is a violation of DR 1-102, quoted above.

In 1976, Marvin Copple asked Paul Galter, a Lincoln attorney, to help Copple develop eighty acres of land south of Lincoln. At the time, Copple was a director of Commonwealth Savings Company. Galter then suggested Douglas be included in the project, to which Copple agreed. This development became known as Fox Hollow. Douglas also helped Copple on an unsuccessful project in Lincoln known as Timber Ridge.

It is Douglas' compensation from these projects that is the basis for Count I of the Charges. As stated by Douglas, his services basically consisted of "counseling"—"counseling on the building projects, what we could do to move the project along faster, what problems there were and how to solve the problems." Statement of Paul L. Douglas, November 30, 1983.

Mr. Douglas estimated that his involvement with the Fox Hollow matter ended in approximately 1980. He then became involved in the Timber Ridge project.

Payment for services on these projects occurred as follows:

1. Douglas and Galter would purchase lots in the development at a set price.

2. Copple would find buyers for the lots, at a higher price, and the profit from the transaction would be Galter's and Douglas' compensation.

In addition to these profits, Douglas received \$37,500 in payments from Copple from December 20, 1978, through December 5, 1980, but these payments were not specifically disclosed by Douglas when he was interviewed by Domina. Instead, in the sworn statement of November 30, 1983, the following answers were given by Douglas:

"Q. Did you serve as counsel in connection with that development [Timber Ridge] and receive compensation?

"A. Yes

"Q. All right. Were there other developments, then, besides Fox Hollow and Timber Ridge for which you were paid for services as counsel?

"A. There was always something coming up, and as it was requiring my time and my counsel - and I would remind him of it and periodically - he would pay me for it

"Q. Did you every specifically bill Mr. Copple for your counsel on these other projects other than Fox Hollow and Timber Ridge?

"A. No.

"Q. Did you ever given him orally, you know, a figure or ask for a specific amount of compensation on those other projects?

"A. No.

"Q. How did he pay you for your services on the projects other than Fox Hollow and Timber Ridge or did he?

"A. He never did pay me."

Statement of November 30, 1983, at pages 18-20.

Stated simply, Douglas was never asked specifically what the other compensation was, nor was he asked the amount he was paid when he stated, "[H]e would pay me for it." And, of course, he never volunteered the information.

Later, Mr. Douglas did volunteer this information, when he wrote to Special Counsel Richard G. Kopf on February 6, 1984, in a 36-page letter, where he stated:

"[T]here is one thing I want to disclose. Although I advised Mr. Domina that Marvin Copple made payments to me from time to time, no one has ever asked me whether or not the only payments I received for my services in connection with all the real estate developments in which Paul Galter, Marvin Copple and I were involved were received

as profits from the lots sales. Because of the extensive additional work which I did and in which Paul Galter had little participation relating to the noise problems, alternative construction methods, the flowage easement and miscellaneous other matters, I was paid a total of \$32,500 during 1978, 1979 and 1980." (sic)

Articles of Impeachment on Mr. Douglas were tried before the Nebraska Supreme Court commencing March 26, 1984. Specification Number One of these Articles was basically the same charge as Count One of the Charges before us. The opinion of the Supreme Court found Mr. Douglas not guilty on this count, because five or more justices could not concur on a guilty verdict:

"If the purpose of [Domina's] inquiry was to learn the nature of Douglas' association with Copple and the nature of or reason for payments to Douglas by Copple, it must be conceded that Douglas made a disclosure commensurate with the inquiry. At no time was Douglas asked the amount of compensation received, nor in another lengthy question and answer session 12 days later was the question raised. It had been made clear to the questioner that Douglas had been compensated not only by profit on the sale of lots but otherwise, by payments. 'I would remind him of it and periodically—he would pay me for it.' It only remained for the questioner to ask the amount and any other details." *State v. Douglas*, 217 Neb. 199, 214-15, 349 N.W.2d 870, 880 (1984).

In light of Mr. Douglas' letter of February 6, 1984, we must agree with this opinion of the Supreme Court. We cannot say that his failure to volunteer the added information rises to a violation of the Code of Professional Responsibility. No damage to the investigation was shown by this failure to volunteer an exact amount, since the transactions between Mr. Douglas and Copple were severely analyzed by the Legislature's investigation, as well as the review of Mr. Douglas' income tax records. Under these circumstances we find there are insufficient reasonable grounds to state a violation of the Code under Count I, although we do find reasonable grounds for the remaining Counts.

COUNTS II, III, IV and V

These Counts all deal with Mr. Douglas' failure to comply with the disclosure requirements of Section 49-1496, R.R.S. 1943, part of the Nebraska Political Accountability and Disclosure Act. The portion Mr. Douglas is alleged to have violated is subsection (d), which requires disclosure of the following:

- "(d) The name and address of each creditor to whom the value of one thousand dollars or more was owed by the filer or a member of the filer's immediate family. Accounts payable, debts arising out of retail installment transactions or from loans made by financial institutions in the ordinary course of business, loans from a relative, and land contracts that have been properly recorded with the county clerk or the register of deeds need not be included"

Mr. Douglas entered into three contracts for the purchase of real estate with Marvin Copple. The first contract was entered into on January 12, 1977, for the amount of \$241,744.00 (Count II), the second contract was signed on September 8, 1977, for \$320,755.00 (Count III), and the third was signed on June 1, 1979, for \$105,600.00 (Count IV). It is undisputed that these contracts were not recorded.

The fifth Count (Count V) charges Mr. Douglas with borrowing \$241,744.00 from Commonwealth Savings Company on April 20, 1977, and failing to report this obligation in his Statement of Financial Interests for the years 1977, 1978 and 1979. The contracts and note were all paid and Mr. Douglas had no outstanding obligations owing to Commonwealth at the time of its collapse.

Mr. Douglas defends his non-disclosure of the real estate contracts on the grounds that he and the other two parties involved, Mr. Galter and Mr. Copple, did not consider these contracts to be obligations due and owing to Copple but a mechanism to compensate Mr. Douglas and Mr. Galter for services rendered to Copple for the work done on the land development, discussed under Count I, above. Both Mr. Douglas and Mr. Galter testified that they did not consider the obligation due and owing until the lots were sold and they were obligated to make payments to Copple only out of the proceeds of such sale. However, Mr. Douglas' testimony in the sworn statement of November 30, 1983, tends to refute this. He refers to the agreement of January 12, 1977, as a "contract" and adds that he took the loan of

\$241,744.00 from Commonwealth on April 20, 1977, to "pay off the Copple contract."

Mr. Douglas further testified on cross-examination before the Committee on Inquiry, District Two, on August 14, 1984. He admitted that these three agreements were contracts, that he had assumed a risk, and that he was not protected from loss, but added, "But as long as the contracts were between Mr. Marvin Copple and myself, ourselves, I was confident that Mr. Copple knew the purpose of those agreements While those agreements were with Mr. Copple, I did not in the least think that Mr. Copple was going to enforce those contracts on it." The weakness in this position is that Mr. Douglas seems to be implying that because of a tacit, unwritten "understanding", not a part of the contracts themselves, the contract becomes less than a debt, and not subject to the disclosure requirements of Section 49-1496. The fact remains, and Mr. Douglas admitted it, that "it is true that I had an obligation to Marvin until Marvin found a buyer, and then the obligation to Marvin would be paid off." Douglas' statement of November 30, 1983.

In his testimony before the Committee of Inquiry, Mr. Douglas said this statement of November 30, 1983, was in response to the questioner's implication that Douglas was a "strawman" for Mr. Copple. However, this is really an untenable position. He cannot say these agreements were not true contracts for the purposes of disclosure under the law and yet maintain that they were true contracts in order to avoid the "strawman" accusation.

As to the loan of \$241,744.00 under Count V, Section 49-1496 creates a disclosure exception if the loan is in the "ordinary course of business." Mr. Douglas claims this exception. However, there was no financial statement from Douglas filed with Commonwealth, nor was there a loan application. The proceeds of the loan were used to pay Copple, an officer of the lending institution giving Mr. Douglas the credit. Mr. Douglas did not even seek the loan, as it was arranged by Mr. Copple. In his written response to the Miller-Domina report, Mr. Douglas stated:

"I was surprised, in April of 1977, to find that Marvin had 'sold' the contract to Commonwealth Company by arranging for a loan to us from them to enable us to pay off the contract We had not been consulted nor had the matter been discussed with us." (Exhibit 10, p. 28).

Such a procedure is hardly in the "ordinary course of business."

Canon One of the Code of Professional Responsibility sets forth a very broad and imposing duty on lawyers:

"A Lawyer Should Assist in Maintaining the Integrity and Competence of the Legal Profession."

In defining this duty, Disciplinary Rule 1-101 specifically prohibits conduct that may constitute "misrepresentation" or be "prejudicial to the administration of justice." This duty is applicable to the lawyer, whether or not he is engaged in the performance of his professional duties at the time. See ABA Committee on

Ethics and Professional Responsibility, Formal Opinion 336 (June 3, 1974).

Various failures to accurately or adequately disclose information have been found to be violations of DR 1-101 (A) (4) and (5), including:

1. A duty to inform the court and opposing counsel that the client has died (ABA Committee on Ethics and Professional Responsibility, Informal Opinion 1169, August 9, 1970);

2. A duty to report any unprivileged knowledge the lawyer may have of the commission of a crime to prosecuting authorities (Informal Opinion 1210, February 9, 1972);

3. A duty to disclose to the court and opposing counsel that a lawyer has entered into a "Mary Carter" agreement, settling with some, but not all, of the defendants;

4. A duty to disclose that a lawyer has given active and extensive assistance to a defendant the court thinks is proceedings without a lawyer (Informal Opinion 1414, June 6, 1978).

Perhaps the essence of Canon One and DR 1-101 is best summed up by one sentence found in Ethical Consideration 1-5 of the Code:

"To lawyers especially, respect for the law should be more than a platitude."

Canon Nine also imposes a somewhat vague but nevertheless high duty on a lawyer when it requires all lawyers to avoid "even the appearance of professional

impropriety." This too has been applied to prohibit various forms of misrepresentation or failures to be completely candid, including:

1. Recording conversations without the consent or prior knowledge of all parties to the conversation (Formal Opinion 337, August 10, 1974);

2. Prohibiting a lawyer-legislator who has voted for the passage of legislation from accepting employment to contest the constitutionality of that same legislation (Informal Opinion 1182, December 5, 1971);

3. Prohibiting a former attorney general from representing class plaintiffs in matters that were investigated during the attorney general's prior public employment (Informal Opinion 1462, August 12, 1980).

Again, the essence of this Canon may be found in one sentence from the Ethical Considerations interpreting it:

"When explicit ethical guidance does not exist, a lawyer should determine his conduct by acting in a manner that promotes public confidence in the integrity and efficiency of the legal system and the legal profession." EC 9-2.

"A lawyer should promote confidence in our system and in his profession so that the concept that we are a government of laws may endure and the people may continue to have faith that justice can be obtained." R. Wise, *Legal Ethics* 123 (1970).

We believe that the conduct alleged in Counts II through V constitutes violations of the Code of Professional Responsibility.

COUNT VI

This Court charges that Mr. Douglas performed services for Copple relating to real estate development in 1978, 1979, and 1980, and failed to report that he received income from Copple in excess of \$1,000.00 in each of these years.

The formal charges specify that these actions constitute a violation of this Oath of Office as an attorney licensed to practice law in the State of Nebraska, and again are in violation of those portions of the Code of Professional Responsibility outlined in the discussion under Counts II through V.

Mr. Douglas did indicate on his disclosure forms that he had received income in excess of \$1,000.00 from Fox Hollow Development. Mr. Douglas' brief states that there is no such entity as Fox Hollow Development, but that Mr. Copple used this as an unregistered trade name. The address of Mr. Copple's office was used. The complainant's petition relies on the fact that most of the work Mr. Douglas did was done on Timber Ridge and not Fox Hollow. As both of these were Mr. Copple's projects, this seems at best a hairsplitting argument. A more important question is why Mr. Copple was not mentioned in the disclosure statements, as we believe the statute specifically requires. Respondent's brief states that it was common knowledge around Lincoln that Copple was the developer of Fox Hollow. If this is true, it is difficult to understand why Mr. Douglas did not list Copple's name and comply with the letter of the statute. Such a failure to disclose becomes even more important when viewed with the later Commonwealth

problems. One of the obvious purposes of the statute is the disclosure of information that might indicate a public servant's prejudices or conflicts of interest. To use an unregistered trade name as the disclosure, rather than the name of the person actually making the payment, constitutes "misrepresentation" in this instance, and thus a violation of DR 1-102.

CONCLUSION

We find there are not sufficient reasonable grounds to discipline Paul Douglas as to Count I of the Formal Charges, and therefore that Count is dismissed. However, reasonable grounds do exist for discipline as to Counts II, III IV, V and VI, and these Counts shall be submitted to the Clerk of the Supreme Court pursuant to Rule 9(L) of the Supreme Court Disciplinary Rules.

DISCIPLINARY REVIEW BOARD

/s/ BY J. Arthur Curtiss
Chairman

NOTE

Mr. Douglas was convicted in the District Court of Lancaster County, of Receiving Money for Services not Rendered, on December 14, 1984. An appeal to the Nebraska Supreme Court was filed on March 15, 1985. As this conviction is on appeal, it was not considered by this Board.

(Caption Omitted in Printing)

AMENDMENT TO FORMAL CHARGE

COMES NOW the Disciplinary Review Board and hereby amends the Formal Charge of the Second District Committee on Inquiry, dated September 17, 1984, by deleting therefrom that portion thereof captioned "*COUNT I*" and the three numbered paragraphs comprising the same, all as indicated thereon and as authorized by Disciplinary Rule 9(L).

DISCIPLINARY REVIEW BOARD

By /s/ J. Arthur Curtiss
J. Arthur Curtiss, Chairman

(Caption Omitted in Printing)

FORMAL CHARGE

COMES NOW the Committee on Inquiry, Second Disciplinary District, and does herewith file its Formal Charge against the Respondent, Paul L. Douglas, and in connection therewith alleges as follows:

The following allegations apply to Counts I through VI inclusive as if fully set out in each Count.

- (a) That on June 18, 1953, Paul L. Douglas was admitted to the practice of law in the State of Nebraska by the Supreme Court of the State of Nebraska.
- (b) That from the year 1975, and at all times mentioned herein, Paul L. Douglas was the duly elected, qualified and acting Attorney General of the State of Nebraska, and was the chief law enforcement officer of the State of Nebraska.
- (c) That on or about November 1, 1983, the Commonwealth Savings Company of Lincoln, Nebraska, was declared and found insolvent by the Department of Banking and Finance of the State of Nebraska.
- (d) That on or about November 19, 1983, the said Paul L. Douglas, as the Attorney General of the State of Nebraska, appointed David A. Domina, an attorney at law in the State of Nebraska, as Special Assistant Attorney General for the purpose of representing the State

of Nebraska in all matters pertaining to the said Commonwealth Savings Company and to conduct such investigation and make such inquiries as were necessary and proper.

- (e) That the said David A. Domina, acting in his capacity as such Special Assistant Attorney General for the State of Nebraska, did thereafter conduct an investigation and make inquiries concerning any actions by public officials including the Respondent herein, concerning the insolvency of the said Commonwealth Savings Company.
- (f) That while serving in such capacity and for the purposes stated, the said David A. Domina, as Special Assistant Attorney General of the State of Nebraska, interrogated and obtained sworn statements from the Respondent on or about November 30, 1983, and December 12, 1983, and which sworn statements were taken pursuant to law and after the Miranda Warning was given to the Respondent.
- (g) That from the year 1977 through the year 1980, Marvin E. Copple, a resident of Lincoln, Lancaster County, Nebraska, was a director and/or officer of said Commonwealth Savings Company.

COUNT I

~~1. From the year 1977 to and including 1980, Paul L. Douglas, the Respondent, purchased real estate from~~

~~the said Marvin E. Copple and provided to him consulting and legal services regarding various land developments undertaken by the said Marvin E. Copple.~~

~~2. That in the sworn statements of November 30, 1983, and December 12, 1983, hereinabove referred to, which were given and made by the said Paul L. Douglas, Respondent, he was asked numerous questions by the said David A. Domina, Special Assistant Attorney General of the State of Nebraska, concerning compensation and legal fees received by Paul L. Douglas, Respondent, from the said Marvin E. Copple, that in said sworn statements, Paul L. Douglas, Respondent, knowingly and intentionally failed to disclose to said David A. Domina, Special Assistant Attorney General of the State of Nebraska, that he, the Respondent, had actually received compensation and legal fees from the said Marvin E. Copple during the years 1977 to and including 1980, in the aggregate amount of \$37,500.00.~~

~~3. That the above alleged acts of the Respondent, as set forth in this Count I, constitute a violation of the oath of office of an attorney taken by the said Respondent at the time he was admitted to practice law in the State of Nebraska, as set forth in Section 7-104, Revised Statutes of Nebraska, 1943, and all of which were and are a violation of the following provisions of the Code of Professional Responsibility adopted by the Supreme Court of the State of Nebraska on May 1, 1970, and as subsequently amended, to wit:~~

~~DR 1-102 Misconduct.~~

~~(A) A lawyer shall not:~~

~~(1) Violate a Disciplinary Rule.~~

~~(3) Engage in illegal conduct involving moral turpitude.~~

~~(4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.~~

~~(6) Engage in any other conduct that adversely reflects on his fitness to practice law.~~

COUNT II

1. That on or about January 12, 1977, the Respondent, Paul L. Douglas, and Paul Galter, an attorney at law and a resident of Lincoln, Lancaster County, Nebraska, and a business associate of the Respondent, jointly signed a Purchase Agreement in which they contracted to purchase certain real estate from the said Marvin E. Copple for the sum of \$241,744.00.

2. That at all times mentioned herein, there was in existence, the Nebraska Political Accountability and Disclosure Act, being Sections 49-1401 to 49-14,138, Revised Statutes of Nebraska, 1943, Reissue of 1978, as amended effective August 30, 1981, 1982 Cumulative Supplement; that pursuant to the terms, provisions and requirements of said Nebraska Political Accountability and Disclosure Act, the said Paul L. Douglas, Respondent, did file on February 27, 1978, with the Nebraska Accountability and Disclosure Commission, a statement of financial interest as required by said Act for the calendar year 1977.

3. That Section 49-1496 of said Act required the Respondent to disclose the name, address and nature of business of each creditor from whom any income in the value of \$1,000.00 or more was received, or to whom the Respondent may have owed or guaranteed the sum of \$1,000.00 or more.

4. That in said statement filed by the said Paul L. Douglas, Respondent, on February 27, 1978, he failed to report or to disclose that he had contracted to purchase certain real estate from Marvin E. Copple for the sum of \$241,744.00, and that he was so indebted to Marvin E. Copple, and that Marvin E. Copple was a creditor of the said Paul L. Douglas, Respondent, in the amount of \$241,744.00; that the failure of the said Paul L. Douglas, Respondent, to so report and disclose the said indebtedness.

5. That the actions of the Respondent, as set forth above, constitute a violation of his Oath of Office as an attorney licensed to practice law in the State of Nebraska, as provided by Section 7-104 R.R.S. 1977, and are in violation of the following provisions of the Code of Professional Responsibility, to-wit:

DR 1-102 Misconduct.

(A) A lawyer shall not:

(1) Violate a Disciplinary Rule.

(3) Engage in illegal conduct involving moral turpitude.

(4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

(6) Engage in any other conduct that adversely reflects on his fitness to practice law.

COUNT III

1. That on or about September 8, 1977, the Respondent, Paul L. Douglas, and Paul Galter, an attorney at law and a resident of Lincoln, Lancaster County, Nebraska, and a business associate of the Respondent, jointly signed a Purchase Agreement in which they contracted to purchase certain real estate from the said Marvin E. Copple for the sum of \$320,755.00.

2. Paragraph 2 of Count II is made a part hereof by reference, as if fully set out herein.

3. Paragraph 3 of Count II is made a part hereof by reference, as if fully set out herein.

4. That in said statement filed by the said Paul L. Douglas, Respondent, on February 27, 1978, he failed to report or to disclose that he had contracted to purchase certain real estate from Marvin E. Copple for the sum of \$320,755.00, and that he was so indebted to Marvin E. Copple, and that Marvin E. Copple was a creditor of the said Paul L. Douglas, Respondent, in the amount of \$320,755.00; that the failure of the said Paul L. Douglas, Respondent, to so report and disclose the said indebtedness.

5. That the actions of the Respondent, as set forth above, constitute a violation of his Oath of Office as an attorney licensed to practice law in the State of Nebraska, as provided by Section 7-104 R.R.S. 1977,

and are in violation of the following provisions of the Code of Professional Responsibility, to-wit:

DR 1-102 Misconduct.

(A) A lawyer shall not:

(1) Violate a Disciplinary Rule.

(3) Engage in illegal conduct involving moral turpitude.

(4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

(6) Engage in any other conduct that adversely reflects on his fitness to practice law.

COUNT IV

1. That on or about June 1, 1979, the Respondent, Paul L. Douglas, and Paul Galter, an attorney at law and a resident of Lincoln, Lancaster County, Nebraska, and a business associate of the Respondent, jointly signed a Purchase Agreement in which they contracted to purchase certain real estate from the said Marvin E. Copple for the sum of \$105,600.00

2. Paragraph 2 of Count II is made a part hereof by reference, as if fully set out herein.

3. Paragraph 3 of Count II is made a part hereof by reference, as if fully set out herein.

4. That in said statement filed by the said Paul L. Douglas, Respondent, on March 27, 1980, he failed to report or to disclose that he had contracted to purchase certain real estate from Marvin E. Copple for the sum

of \$105,600.00, and that he was so indebted to Marvin E. Copple, and that Marvin E. Copple was a creditor of the said Paul L. Douglas, Respondent, in the amount of \$105,600.00; that the failure of the said Paul L. Douglas, Respondent, to so report and disclose the said indebtedness.

5. That the actions of the Respondent, as set forth above, constitute a violation of his Oath of Office as an attorney licensed to practice law in the State of Nebraska, as provided by Section 7-104 R.R.S. 1977, and are in violation of the following provisions of the Code of Professional Responsibility, to-wit:

DR 1-102 Misconduct.

(A) A lawyer shall not:

(1) Violate a Disciplinary Rule.

(3) Engage in illegal conduct involving moral turpitude.

(4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

(6) Engage in any other conduct that adversely reflects on his fitness to practice law.

COUNT V

1. That on or about April 20, 1977, the Respondent, Paul L. Douglas, borrowed from the Commonwealth Savings Company of Lincoln, the sum of \$241,744.00; that said loan was thereafter extended and renewed until on or about August 30, 1979, when said loan was paid in full by the Respondent, Paul L. Douglas; that

the said loan and the extensions and the renewals thereof were not made in the ordinary course of business.

2. Paragraph 2 of Count II is made a part hereof by reference, as if fully set out herein.

3. Paragraph 3 of Count II is made a part hereof by reference, as if fully set out herein.

4. That the Respondent, Paul L. Douglas, failed to report or to disclose the above-mentioned loan of April 20, 1977, and its subsequent renewals in the statements filed for the years 1977, 1978 and 1979.

5. That the actions of the Respondent, as set forth above, constitute a violation of his Oath of Office as an attorney licensed to practice law in the State of Nebraska, as provided by Section 7-104 R.R.S. 1977, and are in violation of the following provisions of the Code of Professional Responsibility, to-wit:

DR 1-102 Misconduct.

(A) A lawyer shall not:

(1) Violate a Disciplinary Rule.

(3) Engage in illegal conduct involving moral turpitude.

(4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

(6) Engage in any other conduct that adversely reflects on his fitness to practice law.

COUNT VI

1. That in the years 1978, 1979 and 1980, the Respondent, Paul L. Douglas, performed legal services for Marvin E. Copple in connection with the Timber Ridge Real Estate Development, and that in consideration of the above services, the said Marvin E. Copple paid to the Respondent, Paul L. Douglas, by his personal check the following:

\$ 5,000.00 on or about December 19, 1978

\$ 5,000.00 on or about April 13, 1979

\$ 7,500.00 on or about September 5, 1979

\$15,000.00 on or about December 24, 1980

\$ 5,000.00 in the year 1980

(exact date not given)

TOTAL - \$37,500.00

2. Paragraph 2 of Count II is made a part hereof by reference, as if fully set out herein.

3. Paragraph 3 of Count II is made a part hereof by reference, as if fully set out herein.

4. That in the statement filed by the said Paul L. Douglas, Respondent, for the calendar years 1978, 1979 and 1980, he failed to report or to disclose therein that he had received income of more than \$1,000.00 in each of said years from the said Marvin E. Copple or from the Timber Ridge Real Estate Development, as herein alleged.

5. That the actions of the Respondent, as set forth above, constitute a violation of his Oath of Office as an attorney licensed to practice law in the State of Nebraska, as provided by Section 7-104 R.R.S. 1977,

and are in violation of the following provisions of the Code of Professional Responsibility, to-wit:

DR 1-102 Misconduct.

(A) A lawyer shall not:

(1) Violate a Disciplinary Rule.

(3) Engage in illegal conduct involving moral turpitude.

(4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

(6) Engage in any other conduct that adversely reflects on his fitness to practice law.

DATED at Omaha, Nebraska, this 17th day of September, 1984.

COMMITTEE ON INQUIRY
Second Disciplinary District of
the Nebraska State Bar Association

BY: /s/ Jack W. Marer
Chairman

(Caption Omitted in Printing)

OBJECTION AND MOTION TO REINSTATE COUNT I

COMES NOW Dennis G. Carlson, Counsel for Discipline of the Nebraska State Bar Association, and hereby objects to the deletion of Count I of the Formal Charges by the Disciplinary Review Board and hereby Moves the Court to reinstate Count I pursuant to Rule 10 (B) of the Supreme Court Rules of Disciplinary Proceedings. In support of said Objection and Motion Dennis G. Carlson alleges that the record before the Disciplinary Review Board pertaining to Count I adequately reflects reasonable grounds for the discipline of the Respondent and that the decision of the Disciplinary Review Board is contrary to the evidence.

/s/ Dennis G. Carlson
Dennis G. Carlson
Counsel for Discipline
Nebraska State Bar Association

STATE OF NEBRASKA)
NEBRASKA STATE)SS.
BAR ASSOCIATION)

I hereby certify that on this 24th day of July, 1985, I served the Objection and Motion to Reinstate Count I on William E. Morrow, Jr., by mailing a copy of same certified mail, return receipt requested to One Merrill Lynch Plaza, 10330 Regency Parkway Dr., Omaha, Nebraska 68114.

/s/ Dennis G. Carlson
Dennis G. Carlson
Counsel for Discipline

(Caption Omitted in Printing)

MOTION TO DISQUALIFY COUNSEL
AND STRIKE FILINGS

COMES NOW Paul L. Douglas, Respondent, by and through his counsel, William E. Morrow, Jr. and respectfully shows unto the court.

I

Respondent's counsel in this and prior matters has been William E. Morrow, Jr. and Erickson & Sederstrom, P.C. John C. Brownrigg is a member of the firm Erickson & Sederstrom, P.C. and is a duly elected, qualified and acting member of the Executive Council of the Nebraska State Bar Association.

II

Dennis Carlson is the Counsel for Discipline of the Nebraska State Bar Association.

III

On April 15, 1985, the Advisory Committee appointed by this Court for the Nebraska State Bar Association issued two opinions, copies of which are attached hereto, marked exhibits "A" and "B" and incorporated herein by reference as fully as if set forth at length at this point.

IV

Respondent is informed and believes that Dennis Carlson, purporting to act as counsel for complainant has filed certain pleadings entitled "Objection and Motion to reinstate Count I" and "Additional Formal

Charges" in this matter. It appears that Dennis Carlson's conducting the prosecution of this matter would involve a violation of Disciplinary Rules 5-101(A) and 5-105(A), and Cannon 9.

V

The motion filed herein by Dennis Carlson is not in compliance with Rule 6(C)(2) of this Court.

WHEREFORE Respondent moves the Court for an order disqualifying Dennis Carlson from prosecuting this matter on behalf of Complainant striking all matters filed by him herein, and setting a date for Respondent to file his response herein.

PAUL L. DOUGLAS, Respondent

By /s/ W. E. Morrow, Jr.

William E. Morrow, Jr. - #12936
ERICKSON & SEDERSTROM, P.C.
One Merrill Lynch Plaza
10330 Regency Parkway Drive
Omaha, Nebraska 68114
(402) 397-2200

CERTIFICATE OF SERVICE

It is hereby certified that a true and correct copy of the above and foregoing was mailed by United States mail, postage prepaid to Dennis G. Carlson, Counsel for Discipline, Nebraska State Bar Association, 1019 American Charter Center, 206 South 13th Street, Lincoln, Nebraska 68508, this 25 day of July, 1985.

/s/ W. E. Morrow, Jr.

William E. Morrow, Jr.

Exhibit "A"

THE ADVISORY COMMITTEE

Appointed by
The Nebraska Supreme Court
for the
Nebraska State Bar Association

1227 Lincoln Mall - P.O. Box 81686
Lincoln, Nebraska 68501

April 15, 1985

Dennis G. Carlson, Esq.
Counsel for Discipline
Nebraska State Bar Association
1019 American Charter Center
Lincoln, Nebraska 68508

Dear Mr. Carlson:

We have your request for an advisory opinion as to the ethical implications of the Office of the Counsel for Discipline's investigating or prosecuting an attorney who is represented by a member of the Executive Council of the Nebraska State Bar Association (Association), or a member of his law firm. Additionally, you have requested our guidance as to the ethical implications of your office's investigating or prosecuting a member of the Executive Council, or his law firm.

FACTS.

As the Counsel for Discipline, you are a member of the staff of the Association. The staff manual which has been approved by the Executive Council contains the following description with respect to the Counsel for Discipline.

(3) Counsel for Discipline

The Counsel for Discipline shall be appointed by the President of the Association with the approval of the Executive Council, and his/her appointed term of office shall be on such terms and for such period as shall be designated by the Executive Council. He/she shall not be permitted to engage in the private practice of law except the Council may agree to a reasonable period of transition after the appointment to the position. The Counsel for Discipline shall have such duties as designated by the Supreme Court Rules of Disciplinary Procedure.

Similarly, the Revised Rules of the Supreme Court of Nebraska, relating to disciplinary proceedings, provide in pertinent part:

Rule 8. COUNSEL FOR DISCIPLINE.

(A) The Counsel for Discipline shall be appointed by the President of the Association with the approval of the Executive Council and his appointment and tenure of office shall be on such terms and for such period as may be designated by the Executive Council. He shall not be permitted to engage in the private practice of law except the Executive Council may agree to a reasonable period of transition after his appointment.

DISCUSSION.

It is the opinion of the Committee that Canons 5 and 9 of the Code of Professional Responsibility (Code) provide the answers to your inquiry. Canon 5 states

that a lawyer should always be able to exercise independent professional judgment on behalf of a client, and Canon 9 states that a lawyer should avoid even the appearance of professional impropriety.

Disciplinary Rules 5-101(A) and 5-105(A) provide:

DR 5-101 (A) Except with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property, or personal interest;

DR 5-105 (A) A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve him in representing differing interests, except to the extent permitted under DR 5-105 (C).

Your sole client is the Association. Moreover, your professional duties require you to investigate all complaints against members of the Association and prosecute members of the Association against whom complaints are made, when warranted by the facts disclosed by your investigations. In this respect, you do not have a choice in accepting or declining proffered employment. Nevertheless, the above Disciplinary Rules are instructive, as are Ethical Considerations 5-1 and 5-2 of the Code, which states:

EC 5-1. The professional judgment of a lawyer should be exercised, within the bounds of the law,

solely for the benefit of his client and free of compromising influence and loyalties. Neither his personal interest, the interests of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client.

EC 5-2. A lawyer should not accept proffered employment if his personal interests or desires will, or there is a reasonable probability that they will, effect adversely the advise to be given or services to be rendered a prospective client. After accepting employment, a lawyer carefully should refrain from acquiring a property right or assuming a position that would tend to make his judgment less protective of the interets of his client.

Applying the above cited Disciplinary Rules and Ethical Considerations to your fact situation, your investigating or prosecuting a member of the Association represented by a member of the Executive Council, or a member of his law firm, or investigating or prosecuting a member of the Executive Council, or a his law firm, could involve you in a situation where your ability to exercise independent professional judgment on behalf of the Association, would be compromised. In making this statement the Committee is not suggesting that you would deliberately undertake such an investigation or prosecution with a diminution of vigor, but you necessarily would be opposing, directly or indirectly, one of the six voting members of the governing entity which controls your tenure and compensation.

Lastly, your position as Counsel for Discipline requires you to be a spokesman for the Association as to

disciplinary matters. In this role you should guard against placing yourself in a position where it might appear to the public that you have a conflict of interest, which is proscribed by Cannon 9. Cf. Advisory Opinion No. 77-5.

CONCLUSION.

In the event a member of the Association you are investigating or prosecuting is represented by a member of the Executive Council, or a member of his law firm, you should disqualify yourself. You should also disqualify yourself in any situation presented which might require you to investigate or prosecute a member of the Executive Council, or his law firm.

Sincerely yours,

/s/ Robert A. Barlow
Robert A. Barlow, Chairman

cc: Lyle R. Strom, Esq.
James W.R. Brown, Esq.
Robert T. Gritmit, Esq.
J. Arthur Curtiss, Esq.
Mr. Ted E. Dillow
Members of Committee

Exhibit "B"

THE ADVISORY COMMITTEE

Appointed by
The Nebraska Supreme Court
for the
Nebraska State Bar Association

1227 Lincoln Mall - P.O. Box 81686
Lincoln, Nebraska 68501

April 15, 1985

Lyle E. Strom, Esq., Member
Executive Council
Nebraska State Bar Association
1000 Woodmen Tower
Omaha, Nebraska 68506

Dear Mr. Strom:

On behalf of the Executive Council of the Nebraska State Bar Association (Association), you have requested an advisory opinion as to whether members of the Executive Council and the House Of Delegates, and the members of their respective firms, ethically may represent members of the Association in disciplinary matters instituted by the Counsel for Discipline.

FACTS.

The Counsel for Discipline is a member of the staff of the Association. The staff manual which has been approved by the Executive Council contains the following description with respect to the Counsel for Discipline.

(3) Counsel for Discipline

The Counsel for Discipline shall be appointed by the President of the Association with the approval of the Executive Council, and his/her appointed term of office shall be on such terms and for such period as shall be designated by the Executive Council. He/she shall not be permitted to engage in the private practice of law except the Council may agree to a reasonable period of transition after the appointment to the position. The Counsel for Discipline shall have such duties as designated by the Supreme Court Rules of Disciplinary Procedure.

A chart showing the organization of the Association and the relationship of the Counsel for Discipline thereto is attached. Both the Executive Council and the House of Delegates have elected and appointed and ex officio members. There are approximately sixty-seven members of the House of Delegates, and fifteen members of the Executive Council, six of whom are elected, voting members and the rest ex-officio members. The House of Delegates ultimately is responsible for the adoption of the Association budget and the approval of expenditures, which include the sub-budget of the Office of the Counsel for Discipline, which includes his salary and funds for the operation of his office.

Similarly, the Revised Rules of the Supreme Court of Nebraska, relating to disciplinary proceedings, provide in pertinent part:

Rule 8. COUNSEL FOR DISCIPLINE.

(A) The Counsel for Discipline shall be appointed by the President of the Association with the

approval of the Executive Council and his appointment and tenure of office shall be on such terms and for such period as may be designated by the Executive Council. He shall not be permitted to engage in the private practice of law except the Executive Council may agree to a reasonable period of transition after his appointment.

DISCUSSION and CONCLUSIONS.

The Committee considered your request, and assigned it to one of its members to draft an opinion. This draft opinion was then considered, and the tentative conclusion reached was that it was not the Executive Council or House of Delegates members who were faced with an ethical problem when representing a member of the Association being investigated or prosecuted by the Council for Discipline, but that the Counsel for Discipline was faced with an ethical problem.

Then, the Committee received a request from Dennis G. Carlson, Counsel for Discipline, for an advisory opinion in which he sought the Committee's opinion as to the ethical implications of the Office of the Counsel for Discipline's investigating or prosecuting an attorney who is represented by a member of the Executive Council, or a member of his law firm. A copy of this request is attached, together with the Committee's response to it. You should note that Mr. Carlson also requested the Committee's guidance as to the ethical implications of his office's investigating or prosecuting a member of the Executive Council, or his law firm. This inquiry was not a part of your request.

The Committee considered the Disciplinary Rules and Ethical Considerations under Canon 5, cited in our advisory opinion to Mr. Carlson, and concluded that it was not reasonably probable that the exercise of independent professional judgment by a member of the Executive Council or House of Delegates on behalf of his client member of the Association would be compromised by the fact that his adversary was the Counsel for Discipline. Therefore, the Committee further concluded that it was not unethical for a member of the Executive Council or the House of Delegates to undertake such representation from the standpoint of Canon 5, notwithstanding that the acceptance of that representation, particularly by a member of the Executive Council, directly affects the Counsel for Discipline by placing him in a position where his ability to exercise independent professional judgment on behalf of the Association may be compromised, and also may be questioned from an appearance of impropriety standpoint. There also is a question whether representation of an Association member by a member of the Executive Council involves a conflict of interest and therefore an appearance of impropriety, since the members of the Executive Council also are spokesmen for the Association with reference to the affairs of the Association, including its disciplinary program and procedures. This question, however, does not need to be answered, since it is assumed, based upon our opinion to Mr. Carlson, that he would disqualify himself in the event a member of the Executive Council were representing a member of the Association against whom a complaint was filed requiring investigation or prosecution. This then leaves

the remaining question whether a member of the Executive Council should accept representation of a member of the Association in a disciplinary matter, even when the Counsel for Discipline has disqualified himself. On balance, the Committee is of the opinion that a member of the Association should not have his choice of counsel unduly restricted, and if the Counsel for Discipline has disqualified himself, the right of the member of the Association being investigated or prosecuted to choose effective counsel outweighs possible questions of the appearance of impropriety.

In his request, Mr. Carlson did not ask for the Committee's opinion with reference to the ethical propriety of his office's investigating or prosecuting a member of the Association, who is represented by a member of the House of Delegates. The conclusion of the Committee is that this situation does not require that he disqualify himself. While it is true that the House of Delegates ultimately approves the Association's budget, which includes the sub-budget of the Office of the Counsel for Discipline, and that this sub-budget includes his salary and the operational expenses of his office, the relationship between the Counsel for Discipline and the House of Delegates is remote. The Budget of the Association first is prepared by the Committee on Budget and Audit. This budget then is reviewed by the Executive Council, which makes changes it considers necessary, and the Executive Council budget then is submitted to the House of Delegates at its annual meeting for approval or changes of specific items in it. Moreover, the number of

members of the House of Delegates dilutes the probability that the Counsel for Discipline's ability to exercise independent professional judgment on behalf of the Association would be compromised, or that an appearance of impropriety would be present.

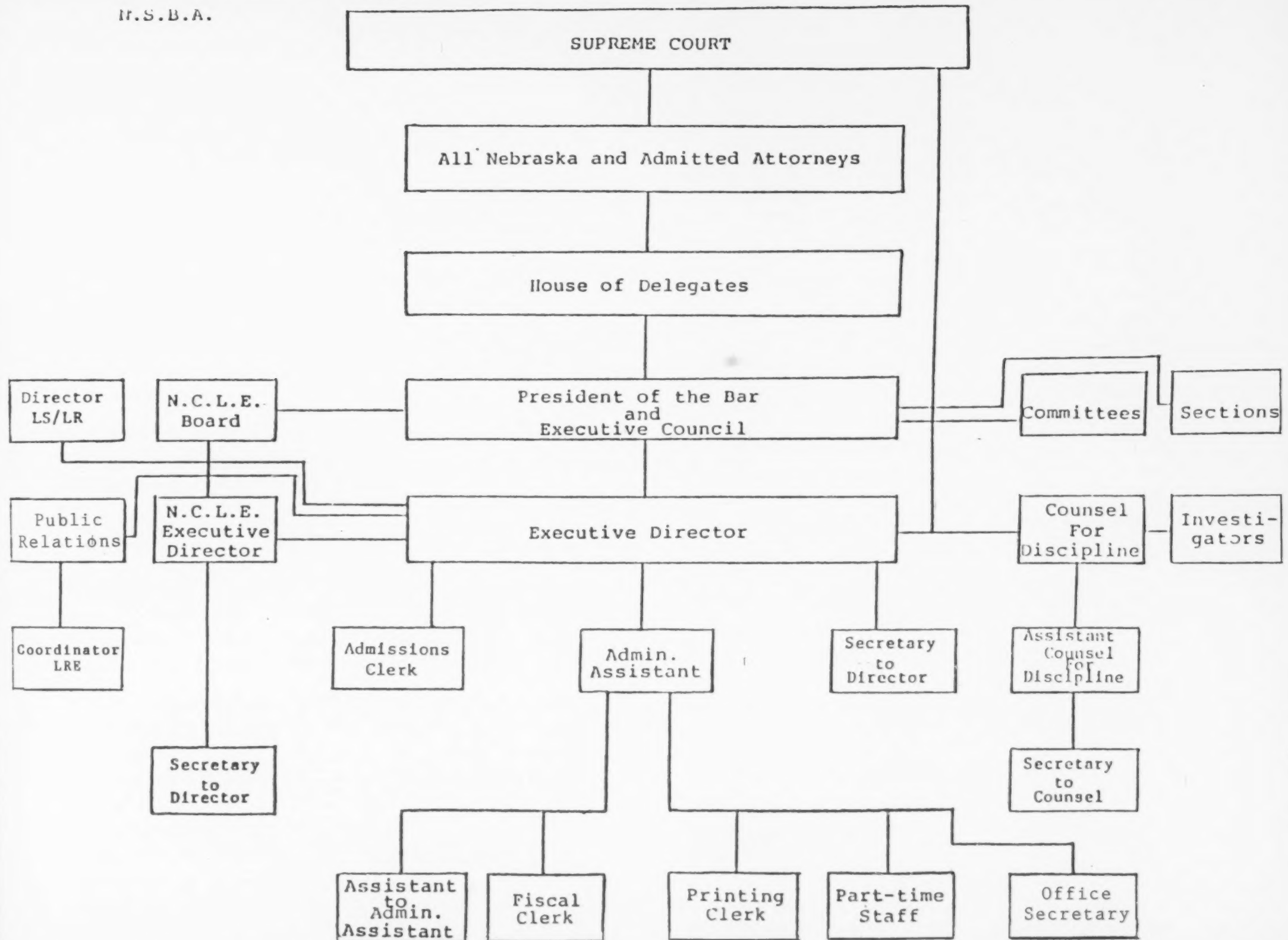
Sincerely yours,

/s/ Robert A. Barlow
Robert A. Barlow, Chairman

cc: James W.R. Brown, Esq.
Robert T. Gritmit, Esq.
J. Arthur Curtiss, Esq.
Mr. Ted E. Dillow
Members of Committee



N.S.B.A.





(Caption Omitted in Printing)

RESPONSE TO MOTION TO DISQUALIFY
COUNSEL AND STRIKE FILINGS

COMES NOW Dennis G. Carlson, in response to the Motion to Disqualify Counsel and Strike Filings, and respectfully shows unto the Court as follows:

1. That the undersigned is the Counsel for Discipline of the Nebraska State Bar Association.

2. That John C. Brownrigg is a member of the Executive Council of the Nebraska State Bar Association.

3. That Respondent's counsel, William E. Morrow, Jr., and John C. Brownrigg are members of the law firm of Erickson & Sederstrom, P.C..

4. That the undersigned has had no discussions with John C. Brownrigg concerning the Paul L. Douglas disciplinary case.

5. That John C. Brownrigg has not attempted to influence the undersigned, directly or indirectly, in regard to the Paul L. Douglas disciplinary case.

6. That on March 13, 1985, the undersigned wrote to Robert A. Barlow, Chairman of the Nebraska State Bar Association's Advisory Committee, and requested an opinion regarding the ethical implications of the Counsel for Discipline investigating or prosecuting an attorney represented by a member of the Executive Council or by a member of his law firm. That a copy of said letter is attached hereto, marked as Exhibit One, and is hereby incorporated by reference.

7. That on April 15, 1985, the Advisory Committee issued an opinion to the undersigned which is set forth in the Respondent's Motion.

8. That the above-mentioned opinion of the Advisory Committee was based upon Rule 8 (A) of the Supreme Court Rules of Disciplinary Proceedings.

9. That on April 29, 1985, this Court amended Rule 8 (A) of the Supreme Court Rules of Disciplinary Proceedings to provide that the appointment and the period of tenure of the Counsel for Discipline shall be subject to the approval of the Court.

10. That the above-mentioned amendment to Rule 8 (A) removes any potential conflict of interest that the undersigned may have had in regard to the prosecution of the above-entitled matter.

11. That the Motion to Reinstate Count I was not scheduled for submission to the Court based upon the assumption that the same would be referred by the Court to a referee. That in view of the Motion to Strike the undersigned has now forwarded a Notice of Hearing to Respondent's counsel.

WHEREFORE, Dennis G. Carlson respectfully urges the Court to overrule the Respondent's Motion to Disqualify Counsel and Strike Filings and to set a date for Respondent to file a response to the Formal Charges.

/s/ Dennis G. Carlson
Dennis G. Carlson
Counsel for Discipline
Nebraska State Bar Association

CERTIFICATE OF SERVICE

It is hereby certified that a true and correct copy of the above and foregoing was mailed by United States mail, postage prepaid to William E. Morrow, Jr., One Merrill Lynch Plaza, 10330 Regency Parkway Drive, Omaha, Nebraska 68114, this 30th day of July, 1985.

/s/ Dennis G. Carlson
Dennis G. Carlson

(Caption Omitted in Printing)

THE FOLLOWING ORDERS HAVE BEEN MADE:
Motion to reinstate Count I sustained. Motions to dis-
qualify counsel and strike filings denied.

RESPECTFULLY, CLERK OF THE SUPREME
COURT.

(Caption Omitted in Printing)

CONDITIONAL ADMISSION

COMES NOW Paul L. Douglas, Respondent, and tenders his conditional admission in exchange for a stated form of judgment as follows:

1. Admits generally the allegations of paragraphs 1 through 5 of Count II.

2. Admits that the conduct of Respondent constituted a violation of the provisions of D.R. 1-102(A)(6) of the Code of Professional Responsibility.

3. Alleges that he has not engaged in the practice of law since the order of suspension was entered by the Court in 85-336 on December 20, 1984.

4. Admits further that the conduct of Respondent was sufficiently grievous to constitute the basis for an eighteen (18) month suspension from the practice of law.

5. This admission is conditioned upon the entry of a stated form of Consent Judgment, a copy of which is attached hereto as exhibit "A", which has been determined to be appropriate by the Counsel for Discipline, and is further conditioned upon approval by this Court; all of which is done pursuant to Rule 13(B) of the Rules of Disciplinary Procedure.

Wherefore, Respondent prays that the Court enter judgment accordingly.

PAUL L. DOUGLAS, Respondent

BY: ERICKSON &
SEDERSTROM, P.C.

255a

BY: /s/ W. E. Morrow, Jr.
William E. Morrow, Jr. - #17745
10330 Regency Parkway Drive
Omaha, NE 68114
(402) 397-2200

/s/ Paul L. Douglas
Paul L. Douglas, Respondent

(Caption Omitted in Printing)

DECLARATION OF THE
COUNSEL FOR DISCIPLINE

COMES NOW Dennis G. Carlson, Counsel for Discipline of the Nebraska State Bar Association, pursuant to Rule 13 of the Rules of Disciplinary Proceedings, and hereby approves the Conditional Admission of the Respondent and agrees that the imposition of an eighteen (18) month suspension with credit for the elapsed time of the temporary suspension is an appropriate sanction in the above-entitled matter.

/s/

Dennis G. Carlson
Counsel for Discipline
Nebraska State Bar Association

SUBSCRIBED and sworn to before me this ____ day
of July, 1986.

/s/

Notary Public

(Caption Omitted in Printing)

ORDER

Thomas J. Walsh of Omaha, Nebraska, is appointed as co-counsel to assist in the prosecution of the charges in this case.

Oral argument on the application for reinstatement filed by the respondent will be heard at 10:00 a.m. on October 31, 1986, in Courtroom No. 1.

September 8, 1986, Lincoln, Nebraska.

SUPREME COURT
OF NEBRASKA
FILED SEP 12, 1986

By the Court
/s/Leslie Boslaugh
Acting Chief Justice

(Caption Omitted in Printing)

**MOTION TO STRIKE ADDITIONAL
FORMAL CHARGES OR TO MAKE MORE
DEFINITE AND CERTAIN**

Respondent Paul L. Douglas moves the Court to strike the Additional Formal Charges filed herein for the following reasons:

1. They were not timely filed in view of the time limits imposed by Disciplinary Rule 10E.

2. They do not comply with the requirements of Disciplinary Rule 10C in that they set forth the alleged charges in summary fashion and not with the "reasonable definiteness" required by that Rule.

In the alternative to paragraph 2 above, and while not waiving its challenge to the timeliness of the charge, defendant moves the Court for its order requiring the plaintiff to state its allegations with reasonable definiteness.

DATED this 22 day of October, 1986.

PAUL L. DOUGLAS, Respondent,

By /s/ W. E. Morrow, Jr.
William E. Morrow - #12936
ERICKSON & SEDERSTROM, P.C.
One Merrill Lynch Plaza
10330 Regency Parkway Drive
Omaha, Nebraska 68114

CERTIFICATE OF SERVICE

It is hereby certified that a true and correct copy of the above and foregoing Motion to Strike Additional Formal Charges was mailed by United States mail, postage prepaid, to: Thomas J. Walsh, 11440 West Center Road, Omaha, NE 68144, and Dennis G. Carlson, 1019 American Charter Center, 206 South 13th Street, Lincoln, NE 68508, this 22 day of October, 1986.

/s/ W. E. Morrow, Jr.
William E. Morrow

(Caption Omitted in Printing)

THE FOLLOWING ORDERS HAVE BEEN MADE:
Motion to reinstate; ruling reserved. Motion to strike to
make more definite and certain; overruled.

RESPECTFULLY, CLERK OF THE SUPREME
COURT.

PROCEEDINGS.

AT THE HEARING BEFORE THE REFEREE THE
FOLLOWING EXHIBITS WERE ADMITTED IN
EVIDENCE.

Law Offices

WALSH, FULLENKAMP, DOYLE & RAU

THOMAS J. WALSH, SR.

JOHN H. FULLENKAMP

ROBERT C. DOYLE

SALLY MILLETT RAU

THOMAS J. WALSH, JR.

RICHARD J. HAUTZINGER

DANIEL D. WALSH

11440 WEST
CENTER ROAD
OMAHA, NEBRASKA
68144
(402) 334-0700

October 7, 1986

William E. Morrow, Esquire

Erickson & Sederstrom, P.C.

One Merrill Lynch Plaza

10330 Regency Parkway Drive

Omaha, Nebraska 68114

RE: State of Nebraska, Ex. Rel.,
Nebraska State Bar Association v.
Paul L. Douglas

Dear Mr. Morrow:

I enclose herewith the following:

1. Notice to take the deposition of Paul Douglas at
your office at 9:30 a.m. on October 16, 1986, as per our
prior discussion.

2. Notice of intention to use the perjury trial testi-
mony of Marvin Copple, should he be unavailable to

testify at the time of formal hearing scheduled by the referee.

3. Additional Formal Charges which I filed earlier today.

In visiting with Mr. Carlson today, I understand that you have made inquiry of him as to the circumstances surrounding my appointment as co-counsel in this matter and so there will be no misunderstanding I want you to know that shortly prior to September 8, 1986, the date of my appointment as co-counsel herein, I received a phone call from Justice Grant asking if I would accept this responsibility and advising that the Court had determined on its own motion that Mr. Carlson's current workload was such that he needed help with this rather complex and protracted matter.

I told Justice Grant that I needed several days to consider the matter and then did call him back several days later and told him that I would accept this responsibility.

I want you to know also that earlier today I did stop at Justice Grant's office when I was in Lincoln to file these additional charges to advise him that I did intend to advise you of our conversation regarding my appointment, at which time I left a copy of these additional charges with him as a matter of courtesy.

I appreciate your cooperation in promptly scheduling Mr. Douglas' deposition, and I want you to know that once that deposition has been taken I am prepared to proceed without further delay to a formal hearing in this matter.

263a

I feel I have had adequate time to review the prior proceedings and I do not intend to ask for any continuance in the matter because of my late arrival on the scene.

Thanking you again for your courtesies in this matter, I remain,

Sincerely yours,

/s/Tom Walsh
Thomas J. Walsh

TJW/jdm/1:Douglas5
encls.

cc: Mr. Dennis Carlson
The Honorable John Grant
Thomas Burke

Office of the
Counsel for Discipline

COUNSEL FOR
DISCIPLINE

Dennis G. Carlson

October 27, 1986

Mr. William E. Morrow, Jr.
Attorney at Law
One Merrill Lynch Plaza
10330 Regency Parkway Drive
Omaha, Nebraska 68114

Dear Bill:

At our meeting at Tom Burke's office on October 22, 1986, Tom Walsh and I informed you that it was our intention for Paul L. Douglas to receive a full and fair hearing in regard to the pending disciplinary Charges. Though you indicated that you did not believe the same to be true we do intend to be frank and open with you.

Though I do not believe the same is a basis for disqualification, I want to advise you that prior to Charges being filed against Paul Douglas with the District Two Committee on Inquiry I was requested by Judge John T. Grant to come to his office. Upon arrival Judge Grant gave to me a copy of the Financial Statements which Paul Douglas had previously filed with the Nebraska Political Accountability and Disclosure Commission. I do not know where Judge Grant received these statements nor did I inquire. I had no conversations in regard to the Douglas case with Judge Grant prior to the above incident nor have I had any conversations with him since then concerning this matter.

265a

Sincerely yours,

/s/ Dennis
Dennis G. Carlson
Counsel for Discipline

DGC: lh

Nebraska State Bar Association
635 South 14th Street
P.O. Box 81809
Lincoln, Nebraska 68501
(402) 475-7091

NEBRASKA SUPREME COURT
DISCIPLINARY RULES

RULE 5. THE ADVISORY COMMITTEE

(A) The Court shall appoint a committee to be known as The Advisory Committee which shall consist of one member from each Supreme Court Judicial District in effect at the time of the adoption of these Rules and as may hereafter be changed, one member of which shall be designated as vice chairman; and a member at large to be Chairman.

(B) When The Advisory Committee is first appointed, one member shall be appointed for a term of one year; one member for two years, one member for three years, one member for four years, one member for five years, one member for six years and one member for seven years. Thereafter the full regular term shall be for seven years and no member shall serve full regular consecutive terms, but may be reappointed after a lapse of one year.

(C) In the interest of continuity and efficiency of operation the Court may deviate from time to time from the above designated terms of membership.

(D) The Advisory Committee shall have the following powers and duties:

(1) In its discretion, render to a member upon his written request an advisory opinion or an interpretation of rules of professional conduct under the Code regarding anticipatory conduct on the part of the member.

(2) Make appropriate arrangements, through its Chairman, for publication and dissemination of such

advisory opinions as the Committee deems of general interest to the members.

RULE 6. THE DISCIPLINARY REVIEW BOARD

(A) The Court shall appoint a committee to be known as The Disciplinary Review Board which shall consist of one member from each Supreme Court Judicial District in effect at the time of the adoption of these Rules and as may hereafter be changed; a member at large to be Chairman, and two residents of Nebraska, not members, representing the public at large.

(B) When The Disciplinary Review Board is first appointed, one member shall be appointed for a term of one year, one member for two years, one member for three years, one member for your years, one member for five years, one member for six years and one member for seven years. Thereafter the full regular term shall be for seven years and no member shall serve full regular consecutive terms, but may be reappointed after a lapse of one year. Initially, one representative of the public shall be appointed for a term of three years and one for a term of four years. Thereafter the full regular term of the representative of the public shall be for three years. Representatives of the public may serve full regular consecutive terms.

(C) In the interest of continuity and efficiency of operation the Court may deviate from time to time from the above designated terms of membership. Any member who is participating in a disciplinary proceeding which is pending at the time the member's term expires shall continue to serve as a member of the Board, with

respect to such proceeding, until final disposition of that proceeding. Such a member will serve in addition to the seven regular members of that Board.

(D) The Disciplinary Review Board shall have the following powers and duties:

(1) If necessary, because of disqualification or unavailability, to direct that the complaint or Charges be referred to some other Committee on Inquiry, in which case the Committee on Inquiry to which it is so referred shall have full power and jurisdiction to the same extent and in like manner as the Committee which had original jurisdiction.

(2) Assume jurisdiction of and determine a matter to the same extent and with like power as a Committee on Inquiry when directed by the Court.

(3) Upon submission of a Formal Charge by a Committee on Inquiry, to review the findings and actions to such Committee on Inquiry made pursuant to Rule 9 (H) (3) (h), to determine if there are reasonable grounds for discipline. If the Disciplinary Review Board so determines, it shall either issue a reprimand or submit the Formal Charge to the Clerk as provided in Rule 9 (L), who shall forthwith enter the same upon the docket of the Court as an original action. If the Disciplinary Review Board determines that reasonable grounds do not exist, it shall dismiss the matter unless otherwise directed by the Court. The Disciplinary Review Board may return the matter to the Committee on Inquiry upon such terms as the Disciplinary Review Board shall specify.

(4) Review a dismissal of a complaint by a Committee on Inquiry upon application of the Counsel for Discipline, the Complainant, or upon its own motion, and take such action as it deems appropriate.

(5) Review a reprimand issued by the Committee on Inquiry in conformity to Rule 9 (H) (3) (g) upon written application of the member against whom the reprimand was issued or the Counsel for Discipline filed within thirty days of issuance of the reprimand, and take such action as it deems appropriate.

(6) A review provided for in subparagraphs (3), (4) or (5) immediately above shall be completed within sixty days after it is received by an Disciplinary Review Board unless the Chairman of the Disciplinary Review Board, because of the extent of the record or the complexity of the issues, determines that additional time is necessary.

RULE 8. COUNSEL FOR DISCIPLINE

(A) The Counsel for Discipline shall be appointed by the President of the Association with the approval of the Executive Council and his appointment and tenure of office shall be on such terms and for such period as may be designated by the Executive Council. He shall not be permitted to engage in the private practice of law except the Executive Council may agree to a reasonable period of transition after his appointment. His appointment and the period of his tenure shall be subject to the approval of this Supreme Court.

(B) The Counsel for Discipline shall have the following powers and duties:

(1) Investigate or to refer for investigation all matters of alleged misconduct called to his attention by complaint or otherwise.

(2) Notify a member in writing that he is the subject of a complaint and furnish him a copy thereof within fifteen days of receipt of the complaint.

(3) Dismiss a complaint if, in his judgment, it is without foundation and merit.

(4) Prepare Charges and file them with the appropriate Committee on Inquiry if, in his judgment, there is sufficient evidence to substantiate such Charges.

(5) Confer with any Committee on Inquiry or the Disciplinary Review Board prior to dismissal of a complaint or preparation of Charges if he is in doubt as to the proper disposition of the matter.

(6) Conduct the examination of witnesses and the production of evidence during a hearing before a Committee on Inquiry or the Disciplinary Review Board, if requested to do so by the Chairman of either the Committee or the Board.

(7) Provide research services for The Advisory Committee and the Disciplinary Review Board.

(8) Maintain records as follows:

(a) Records of correspondence received by the Counsel for Discipline but not classified as a complaint shall be maintained for a period of three years, after which time they may be destroyed.

(b) Records of complaints which have been dismissed by the Counsel for Discipline for lack of foundation and merit, shall be maintained for a period of three years, after which time they may be destroyed.

(c) Records of complaints in which Charges have been filed and then dismissed shall be maintained for a period of five years after final disposition of the complaint, after which time they may be destroyed.

(d) Records of complaints against attorneys that have resulted in a reprimand by the Committee on Inquiry or the Disciplinary Review Board or probation, a reprimand, censure, suspension or disbarment of the attorney shall be maintained until the death of the attorney, after which time they may be destroyed.

(9) Make a semiannual summary report to the Court of all disciplinary matters for each six-month period. Such report shall include the following information:

(a) Number of members complained against.

(b) The general nature of the complaints.

(c) The disposition or status thereof and such other matters as the Court may, from time to time, request.

(d) A copy of this report shall be submitted to the President of the Nebraska State Bar Association. A copy of the portion of the report relating to each Inquiry Committee shall be submitted to the Chairman of that Inquiry Committee.

(10) Assist the Court in any disciplinary matter then pending before the Court, if requested.

RULE 9. PROCEDURE

Committee on Inquiry - Counsel for Discipline - Disciplinary Review Board

(A) All complaints must be filed with the office of the Counsel for Discipline. All complaints received by any other person shall be transmitted forthwith to the Counsel for Discipline.

(B) All investigations, whether upon complaint or otherwise, shall normally be initiated by the Counsel for Discipline.

(C) When it appears to the Counsel for Discipline that allegations of misconduct fail to describe conduct which, if true, would constitute grounds for discipline, he may decline to further investigate and he shall so advise the Complainant in writing with a proper explanation within fifteen days of its receipt. All doubts shall be resolved in favor of an investigation.

(D) If it appears to the Counsel for Discipline that allegations of misconduct do describe conduct which, if true, would constitute grounds for discipline, he shall notify the member against whom the allegations are directed that he is the subject of a complaint, and within fifteen days of its receipt furnish him a copy thereof by certified mail, return receipt requested.

(E) Upon receipt of notice of a complaint from the Counsel for Discipline, the member against whom the complaint is directed shall prepare and submit to the Counsel for Discipline, in writing, within fifteen working days of receipt of such notice, an appropriate response to the complaint, or a response stating that he

refuses to answer substantively and explicitly asserting constitutional or other grounds therefor. For good cause, the Counsel for Discipline may grant additional time for the filing of a response.

(F) If, upon conclusion of any investigation, the Counsel for Discipline determines there are not reasonable grounds for discipline of a member against whom a complaint is directed, he shall dismiss the complaint and shall so advise the Complainant in writing with a proper explanation. The Counsel for Discipline shall further advise such Complainant that an appeal may be taken to the appropriate Committee on Inquiry pursuant to Rule 14 (A).

(G) If, upon conclusion of any investigation, the Counsel for Discipline determines there are reasonable grounds for discipline of a member against whom a complaint is made, he shall reduce the complaint to Charges specifying with particularity the facts which constitute the basis thereof and the grounds for discipline which appear to have been violated and immediately forward said Charges and either his investigation file, or a copy thereof, to the proper Committee on Inquiry.

(H) Upon receipt of the Charges and file from the Counsel for Discipline, the Committee on Inquiry shall within thirty days review the same and consistent therewith either:

(1) Determine the Charges, if true, would not constitute grounds for discipline and dismiss the Charges.

(2) Determine the Charges, if true, would constitute grounds for discipline, but no public interest would be served by the institution of a Formal Charge and thereupon prepare and issue to the Respondent a reprimand which shall be made a permanent part of the file in the office of the Counsel for Discipline and this reprimand shall be received as evidence in any subsequent disciplinary proceedings against the Respondent. The Respondent shall have the right to protest in writing, within twenty days of notification of such reprimand, to the Committee on Inquiry, and thereafter, and within twenty days after such notice, the Chairman of the Committee on Inquiry shall appoint a hearing panel pursuant to Rule 7 (F) or determine that the Committee on Inquiry as a whole shall conduct a hearing on the Charges; such hearing shall be conducted within forty-five days thereafter, after which the Committee on Inquiry may take such action as it deems appropriate. The respondent may appeal the actions of the Committee on Inquiry to the Disciplinary Review Board in conformity with Rules 6 (D) (5) and 14 (D).

(3) Determine a hearing is necessary to ascertain if there are reasonable grounds for discipline of the Respondent which may require a Formal Charge and thereafter the Chairman of the Committee on Inquiry shall forthwith appoint a hearing panel pursuant to Rule 7 (F) or determine that the Committee on Inquiry as a whole shall conduct a hearing on the Charges; such hearing shall be conducted within forty-five days thereafter and the panel or Committee as a whole shall proceed as follows:

(a) Serve a copy of the Charges upon the respondent at the same time notification of the hearing date is given. Hold a hearing upon not less than twenty days' notice to the Respondent and to the Complainant, at which hearing they shall have the right to be heard. Such hearing shall not be an adversary proceeding but shall be in the nature of an additional investigation. The Respondent shall be permitted to be represented by counsel; examine and cross-examine witnesses; have the right of subpoena and subpoena duces tecum and may file with the hearing panel or Committee as a whole any statement, answer, affidavit, document, exhibit, or such other evidence as may be relevant and material.

(b) At such hearing the Counsel for Discipline or a member of the Committee shall conduct the examination of the witnesses and introduce evidence before the hearing panel or Committee as a whole.

(c) The hearing panel or Committee as a whole shall have the right to receive any type of evidence it deems relevant and material, including unsworn statements, and such hearing shall not be conducted in accordance with the ordinary rules of evidence.

(d) Notice of the time and place of hearing shall be given by the Counsel for Discipline to the Respondent by certified mail, return receipt requested, addressed to his address registered with the Secretary of the Association as required by Section 3, Registration, ARTICLE III, Membership, Rules Creating, Controlling and Regulating the Nebraska State Bar Association; and to the Complainant by certified mail, return receipt

requested, addressed to his last known residence or place of business.

(e) At the hearing, the Chairman of the hearing panel or Committee as a whole may continue and adjourn the hearing and proceedings from time to time. If such continuance or adjournment is ordered, the Counsel for Discipline shall give notice thereof to the Complainant and to the Respondent, by certified mail, return receipt requested, unless such persons were present in person or by counsel when such continuance or adjournment was announced.

(f) At the hearing the hearing panel or Committee as a whole shall consider only the Charges of which the Respondent has received the notice required under Rule 9 (H) (3) (a).

(g) Within forty-five days following the termination of the hearing, if the hearing panel or Committee as a whole determines that there are grounds for discipline of the Respondent but that no public interest would be served by the institution of a Formal Charge, it may thereupon prepare and issue to the Respondent a reprimand which shall be made a permanent part of the file in the office of the Counsel for Discipline, and this reprimand shall be received as evidence in any subsequent disciplinary proceeding against the Respondent.

(h) Within forty-five days following the termination of the hearing, if the hearing panel or Committee as a whole finds there are reasonable grounds for discipline of the Respondent and that a Formal Charge is warranted, it shall thereupon transmit to the Chairman of the Disciplinary Review Board a transcript containing

the Charges, and any statement, answer, affidavit, document, exhibit or other evidence submitted and filed with the panel or Committee, and shall accompany the same with a Formal Charge duly prepared and verified by the Chairman or Vice-Chairman of the panel or Committee ready for filing in the Court.

(i) The Formal Charge shall be made in the name of the State of Nebraska on the relation of the Nebraska State Bar Association.

(I) The Disciplinary Review Board shall have the authority to hold further hearings upon said Formal Charge at which the Complainant and the Respondent shall have a right to be heard, but the Board may properly direct disposition of the Formal Charge without a further hearing.

(J) The Disciplinary Review Board may return the matter to the Committee on Inquiry upon such terms as the Board shall specify.

(K) If the Disciplinary Review Board determines that no reasonable grounds exist for discipline of the Respondent, it shall dismiss the Formal Charge.

(L) If the Disciplinary Review Board determines that reasonable grounds do exist for discipline of the Respondent, it shall either issue a reprimand or transmit its record, the transcript, the Formal Charge, any statement, answer, affidavit, document, exhibit, or other evidence submitted to and filed with the Committee on Inquiry and the Disciplinary Review Board, together with such amendments to the Formal Charge as the Board may deem proper, to the Clerk, who shall

forthwith enter the same upon the docket of the Court as an original action.

(M) No Formal Charge in any case shall be entered upon the docket of the Court until having first been considered by the Committee on Inquiry hearing panel or Committee as a whole and the Disciplinary Review Board as herein provided.

RULE 10. PROCEDURE

Nebraska Supreme Court

(A) Proceedings for discipline of members shall be considered civil in their nature and for the purpose of protecting the public and the good name of the members, and may be instituted against any person who has been licensed to practice in the Courts of the State of Nebraska.

(B) Proceedings for discipline of members may be instituted and prosecuted in the name of the State of Nebraska on the relation of the Nebraska State Bar Association without leave of court, or on the relation of any other person if leave of court be first obtained. Leave may be granted to a private person to file proceedings as relator only upon a prima facie showing of probable grounds for disciplinary proceedings, and only after the matter has been submitted to the appropriate Committee on Inquiry, and considered by the Disciplinary Review Board. Proceedings may also be instituted by order of the Court.

(C) Proceedings shall be initiated by the relator filing a verified Formal Charge setting forth the

grounds thereof with reasonable definiteness. The Formal Charge shall be filed with the Clerk who shall then docket the cause as an original proceeding in the Court.

(D) Upon the filing in the Court of a Formal Charge as contemplated and provided for by these Rules against any member, the Court within ten days, in its discretion, may either designate the Counsel for Discipline or appoint any member to prosecute the Formal Charge.

(E) The Counsel for Discipline or any member so appointed may within thirty days, in his discretion, prepare and file an amended Formal Charge. Within five days after the time fixed for filing an amended Formal Charge, service shall be made upon the Respondent as provided for in Paragraph G below.

(F) If the Counsel for Discipline or the member so appointed has in his possession evidence which, in his opinion, warrants any additional Charge or Charges, he may incorporate such additional Charge or Charges in the Formal Charge and prosecute the same, despite the fact that they may not have been presented to the Committee on Inquiry or considered by the Disciplinary Review Board.

(G) Service upon the Respondent may be had by serving upon him a copy of the Formal Charge or any amended Formal Charge and notice of the time for answer in the same manner as service of summons is had in civil proceedings in the District Courts of the State, in which case it shall be proved by the official return of the officer making such service. Service shall be deemed to have been waived if the Respondent shall

sign a written receipt for a copy of the Formal Charge and notice. Service may likewise be had by the mailing by the Clerk of a certified copy of said Formal Charge and notice by certified mail, return receipt requested, to the Respondent at his last known address; and in that event the official return card of the United States mail, signed by the Respondent, acknowledging receipt of the envelope containing the copy of said Formal Charge and notice, shall be deemed sufficient proof of service. In the event that it shall appear by affidavit that personal service cannot be had upon the Respondent and that letters to the Respondent's last known address are returned unclaimed service may be had upon the Respondent by publication of notice for two successive weeks in some legal newspaper published in the county wherein the Respondent last resided. Such notice shall state that Formal Charge for disciplinary action has been filed in the Court against the Respondent and shall give the date of filing and the time within which Respondent is required to answer.

(H) The answer of the Respondent shall be filed within twenty days after service of notice and a copy of the Formal Charge or within twenty days after service by publication, as herein provided, shall have been completed. For good cause shown the Court may extend the time to answer.

(I) If no answer be filed within the time limited therefor, or if the answer raises no issue of fact or of law, the matter may be disposed of by the Court on its own motion or on a motion for judgment on the pleadings.

(J) Upon the filing of an answer raising an issue of fact the Court shall refer the matter to a member as referee within ten days. It shall be the duty of such referee to fix an early date for hearing, notify the relator and the Respondent or their respective attorneys of record, and without delay to hear such testimony as may be introduced under the pleadings. The referee shall have all powers of a referee in civil actions in the Courts of Nebraska. The referee shall observe the rules of evidence applicable in civil actions in the District Courts of the State of Nebraska. He shall have a competent reporter present who shall take in shorthand or by any mechanical device and transcribe in typewriting all oral evidence adduced at the hearing had before the referee. The referee may continue the hearing from time to time as circumstances may require, but shall not delay his proceedings unless justice and equity so require. The referee shall make a written report within four months of his appointment, unless extended by order of the Court, stating his findings of fact and recommendations. The typewritten record of the proceedings shall have attached to it all of the exhibits offered at the hearing, and shall be certified by the referee. The referee shall promptly transmit to the Court his report, together with such record so certified, and shall transmit a copy of his report to the Respondent.

(K) Upon the filing of an answer raising an issue of law only, the Court may, in its discretion, refer the matter to a member as referee for such action in relation thereto as the Court may by its order of reference direct.

(L) Within ten days after the filing of the report of the referee, any party thereto may file written exceptions to such report. If no exceptions are filed, the Court, in its discretion, may consider the findings final and conclusive, and on motion shall enter such order as the evidence and law require.

(M) If exceptions be filed to the findings or report of the referee, briefs and arguments shall be filed and oral arguments made in the Court as required by the Rules of the Court in civil cases. The party filing exceptions to the findings and report of the referee shall serve and file his brief within thirty days after the filing of such report and the brief of the adverse party shall be served and filed within thirty days thereafter. The case shall thereupon be placed upon the Court call for hearing.

(N) The Court may disbar, suspend, censure or reprimand the Respondent, place him on probation, or take such other action as shall by the Court be deemed appropriate.

(O) Any party thereto may file a motion for rehearing at any time within twenty days from the filing of the opinion or rendition of the judgment of the Court.

(P) No initial fee shall be required of any party, but upon motion of the Respondent the Court may require security for costs from any relator other than the Counsel for Discipline or the Association. Costs may be taxed by the Court as the Court shall see fit.

(Q) The Counsel for Discipline shall prosecute any case referred to him by the Court for prosecution and shall have the right to appear and take part in the

prosecution of any other disciplinary action at any stage of the proceedings.

(R) No application for modification of judgment pursuant to Rule 4 of these Rules shall be made prior to the expiration of one year after the final order in such proceedings shall have been entered except in cases where the only service upon Respondent has been by publication, and no appearance has been made by Respondent, and except where the application is made under the terms of Sections 25-2001 to 25-2009, Revised Statutes of Nebraska 1943, Reissue of 1979.

(S) No application for reinstatement from an order of suspension shall be made prior to the expiration of the period of suspension unless otherwise provided by the Court in said order.

(T) No application for reinstatement from an order of disbarment shall be made prior to the expiration of five years after the final order in such proceedings shall have been entered.

(U) Copies of every such application shall be furnished the relator, the Counsel for Discipline, the current Chairman of the Committee on Inquiry for the District which exercised original jurisdiction and the Chairman of the Disciplinary Review Board, any one or more of whom may appear and resist such application. Any other persons may likewise appear upon obtaining leave of the Court and make such resistance. Within twenty days thereafter, the Counsel for Discipline and the District Committee on Inquiry, by its Chairman, shall each file a written statement recommending the

application be granted or denied and the reasons therefor. The Court may deny such application without a hearing if justice and equity require it. If the application or the showing in resistance thereto shall require the taking of evidence, the matter may be referred to a referee and the proceedings shall be the same as in the case of original disciplinary proceedings.

RULE 13. CONDITIONAL ADMISSION OF CHARGES

(A) At any time prior to the Clerk entering a Formal Charge against a Respondent on the docket of the Court, he may file with the Clerk a conditional admission of Charges in exchange for a stated form of consent judgment of discipline as to all or a part of the Charges pending against him as determined to be appropriate by the Counsel for Discipline, the appropriate Committee on Inquiry, and the Chairman of the Disciplinary Review Board, providing such matter is pending before the Disciplinary Review Board; such plea will be subject to approval by the Court. If a tendered plea is not finally approved as above provided, it may not be used as evidence against the Respondent in any way.

(B) At any time after the Clerk has entered a Formal Charge against a Respondent on the docket of the Court, he may file with the Clerk a conditional admission of the Formal Charge in exchange for a stated form of consent judgment of discipline as to all or a part of the Formal Charge pending against him as determined to be appropriate by the Counsel for Discipline or any member appointed to prosecute on behalf of the Association; such plea will be subject to approval by the Court. If a tendered plea is not finally approved as

above provided, it may not be used as evidence against the Respondent in any way.

(C) No publicity will be given to any such conditional admission of Charges or Formal Charge described in (A) and (B) above until approval of the plea by the Court.

RULE 14. RIGHT OF APPEAL

(A) A Complainant may appeal to the appropriate Committee on Inquiry a dismissal of the complaint by the Counsel for Discipline. Except on a showing of good cause, the application for the appeal shall be made to the Chairman of the Committee within thirty days after notification of such dismissal. Said Committee on Inquiry may then take such action as it deems appropriate.

(B) In cases where the Counsel for Discipline prepares Charges and files them with the appropriate Committee on Inquiry pursuant to Rule 9 (G), the Counsel for Discipline shall notify the Complainant by mail of the findings of the Committee on Inquiry and the procedure for appealing the Committee's decision to the Disciplinary Review Board, if appropriate.

(C) If the Committee on Inquiry dismisses the Charges pursuant to Rule 9 (H) (1), either the Complainant or the Counsel for Discipline may appeal the decision to the Disciplinary Review Board by filing written application for appeal with the Chairman of said Board within thirty days of notice of the dismissal of the Charges by the Committee on Inquiry. The Chairman of

said Board shall thereupon obtain from such Committee on Inquiry any transcript containing the Charges and any statement, answer, affidavit, document, exhibit, or such other evidence filed with it, including the report of the Committee, for review and for such action as the Board may deem appropriate.

(D) Either the Respondent or the Counsel for Discipline may appeal to the Disciplinary Review Board a reprimand issued to the Respondent by the Committee on Inquiry upon written application filed with the Chairman of the Disciplinary Review Board within thirty days of issuance of the reprimand. The Respondent may appeal to the Court the action of the Disciplinary Review Board.
